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NORTH CAROLINA REPORTS

VOL. 177

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1919

ROBERT C. STRONG
REPORTER

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MITCHELL PRINTING COMPANY
RALEIGH, N. C.
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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1918

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GEORGE H. BROWN,
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WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
O. H. Guion	Fifth	Craven.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
J. Lloyd Horton	Fifth	Pitt.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. W. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

SPRING TERM, 1919

The following were licensed to practice law by the Supreme Court, Spring Term, 1919:

Allen, Louis Carr	Wake.
Anderson, Charles Curtis	Guilford.
Bolton, Marvin Ewing	Richmond.
Gooch, Clyde Earl	Granville.
Graves, Mrs. Irene Fay	Orange.
Lewis, Roscoe B.	Wake.
Mitchell, Alsey Fuller	Transylvania.
Page, Joseph	Robeson.
Royster, Royall Hobgood	Granville.
Scarboro, Jetter McKinley	Mecklenburg.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1919

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1919
First District	August 26
Second District	September 2
Third and Fourth Districts	September 9
Fifth District	September 16
Sixth District	September 23
Seventh District	September 30
Eighth and Ninth Districts	October 7
Tenth District	October 14
Eleventh District	October 21
Twelfth District	October 28
Thirteenth District	November 4
Fourteenth District	November 11
Fifteenth and Sixteenth Districts	November 18
Seventeenth and Eighteenth Districts	November 25
Nineteenth District	December 2
Twentieth District	December 9

SUPERIOR COURTS, FALL TERM, 1919

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Lyon*

Pasquotank—Sept. 15 (1); Sept. 22† (1); Nov. 10† (1).
Camden—July 14† (1); Nov. 3 (1).
Perquimans—Oct. 27 (1).
Currituck—Sept. 1 (1).
Beaufort—July 21* (1); Sept. 29† (2); Nov. 17 (1); Dec. 15† (1).
Gates—July 28 (1); Dec. 8 (1).
Chowan—Sept. 8 (1); Dec. 1 (1).
Tyrrell—Aug. 4 (1), Nov. 24† (1).
Hyde—Oct. 13 (1).
Dare—Oct. 20 (1).

SECOND JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Devin*

Wilson—Sept. 1† (1); Oct. 27† (2); Dec. 15 (1).
Nash—Aug. 25 (1); Oct. 6 (1); Nov. 24 (2).
Edgecombe—Sept. 8 (1); Nov. 10† (2).
Martin—Sept. 15 (2); Dec. 8 (1).
Washington—July 7; Oct. 13.

THIRD JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Bond*

Warren—Sept. 15 (2).
Halifax—Aug. 11 (2); Nov. 24 (2).
Bertie—June 30 (1); Aug. 25 (2); Nov. 10 (2).
Hertford—Aug. 4 (1); Oct. 13 (2).
Vance—Sept. 29 (2).
Northampton—Aug. 4‡ (1); Oct. 27 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Connor*

Harnett—Sept. 1 (1); Sept. 8† (1); Nov. 10† (2).
Chatham—Oct. 6 (2); Oct. 20.
Wayne—Aug. 18 (2); Oct. 6† (2); Nov. 24 (2).
Johnston—Aug. 11* (1); Sept. 22† (2); Dec. 8 (2).
Lee—July 14 (2); Sept. 15† (1); Oct. 27 (1); Nov. 3† (1).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Kerr*

Craven—Sept. 1* (1); Sept. 29† (2); Nov. 7† (2).
Pitt—Aug. 18† (1); Aug. 25 (1); Sept. 8; Sept. 15 (1); Sept. 22 (1); Nov. 3† (1); Nov. 10 (1).
Greene—Dec. 8 (2).
Carteret—Oct. 13 (1).
Jones—Dec. 1 (1).
Pamlico—Oct. 20 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Daniels*

Duplin—July 21* (1); Aug. 25† (2); Nov. 17 (1); Nov. 24† (1).
Lenoir—Aug. 18* (1); Oct. 13 (1); Nov. 3† (2); Dec. 8* (1).
Sampson—Aug. 4 (2); Sept. 15† (2); Oct. 20 (2).
Onslow—July 14 (1); Oct. 6 (1); Dec. 2† (1).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Guion*

Wake—July 7* (1); Sept. 8* (1); Oct. 6* (1); Nov. 3* (1); Dec. 8* (1); Sept. 15† (2); Sept. 29† (1); Oct. 20† (2); Nov. 24† (2).
Franklin—Aug. 25† (2); Oct. 13* (1); Nov. 10† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Allen*

New Hanover—Aug. 11* (1); Sept. 8† (2); Oct. 3†; Nov. 10*† (1); Dec. 1† (2); Aug. 4† (2).
Pender—Sept. 22† (2); Nov. 3 (1).
Columbus—Aug. 25 (2); Nov. 17† (1); Dec. 15* (1).
Brunswick—Aug. 18† (1); Oct. 6 (1).

NINTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Calvert*

Bladen—Aug. 4* (1); Oct. 3† (1).
Cumberland—Aug. 25* (1); Sept. 15† (2); Oct. 20† (2); Nov. 17* (1).
Hoke—Aug. 11 (1); Nov. 24 (1).
Robeson—July 7* (1); Sept. 1† (2); Sept. 29† (2); Nov. 3* (1); Dec. 1† (2).

TENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Stacy*

Durham—Aug. 25* (1); Sept. 22† (2); Nov. 3† (1); Dec. 8* (1).
Alamance—Aug. 18* (1); Sept. 8† (2); Nov. 24* (1).
Person—Aug. 11 (1); Oct. 13 (1).
Granville—July 21 (1); Nov. 10 (2).
Orange—Sept. 1 (1); Dec. 8 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge McElroy*

Forsyth—July 21* (2); Sept. 8† (2); Sept. 29 (2); Oct. 13* (2); Nov. 3† (2); Dec. 8* (1).
Rockingham—Aug. 4 (2); Nov. 17† (2).
Surry—Aug. 25 (2); Oct. 20 (2).
Caswell—Aug. 18 (1); Dec. 1 (1).
Ashe—July 7 (2); Oct. 13 (1).
Alleghany—Sept. 22 (1).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Bryson*

Guilford—Aug. 11† (2); Sept. 1† (2); Sept. 15* (1); Sept. 22† (1); Oct. 6† (2); Nov. 3† (2); Dec. 1† (1); Dec. 8* (1); Dec. 15* (1).
Davidson—July 28 (2); Nov. 17† (2).
Stokes—Oct. 20* (1); Oct. 27† (1).

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Lane*

Richmond—July 21* (1); Nov. 3* (1); July 14† (1); Sept. 22† (1); Nov. 24† (1).
Anson—Sept. 8* (1); Sept. 29† (1); Nov. 10† (1).
Moore—Aug. 11* (1); Sept. 15† (1); Dec. 8† (1).
Union—July 28 (1); Aug. 18† (2); Oct. 13 (1); Oct. 20† (1).
Stanly—July 7 (1); Oct. 6† (1); Nov. 7 (1).
Scotland—Oct. 27 (1); Nov. 24 (1).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Shaw*

Mecklenburg—July 7 (2); Aug. 25* (1); Sept. 29* (1); Nov. 10* (1); Sept. 1† (2); Oct. 6† (2); Oct. 27† (2); Nov. 17† (2).
Gaston—Aug. 18* (1); Oct. 20* (1); Aug. 11† (1); Sept. 8† (2); Dec. 1† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Adams*

Cabarrus—Aug. 11 (2); Oct. 27 (2).
Montgomery—July 7 (1); Sept. 22† (1); Sept. 29 (1).
Iredell—July 28 (2); Oct. 13 (2).
Rowan—Sept. 8 (2); Oct. 6† (1); Nov. 17 (2).
Davie—Aug. 25 (1); Nov. 10 (1).
Randolph—Sept. 1* (1); Dec. 1 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Harding*

Lincoln—July 14 (1); Oct. 13 (1); Oct. 20† (1).
Caldwell—Aug. 18 (2); Nov. 10 (2).
Burke—Aug. 4 (2); Sept. 20† (2); Dec. 1† (2).
Cleveland—July 21 (2); Oct. 27 (2).
Polk—Sept. 15 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Long*

Wilkes—Aug. 4 (2); Sept. 29† (2).
Catawba—July 7 (2); Oct. 27 (2).
Alexander—Sept. 15 (2).
Yadkin—Aug. 18 (1); Nov. 24 (1).
Watauga—Sept. 1 (2).
Mitchell—July 21† (2); Nov. 10 (2).
Avery—July 30† (1); Oct. 13 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Webb*

McDowell—July 7 (2); Sept. 15 (2).
Rutherford—Aug. 18† (2); Oct. 13 (2).
Henderson—Sept. 29‡ (2); Nov. 10† (2).
Yancey—Aug. 11† (1); Oct. 27 (2).
Transylvania—July 21 (2); Nov. 24 (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Cline*

Buncombe—July 7 (2); Aug. 4† (3); Sept. 1 (3); Sept. 29† (1) or Oct. 6† (1); Nov. 3 (2); Dec. 1† (3).
Madison—Aug. 25 (1); Sept. 22 (1); Oct. 20 (1) or Oct. 27 (1); Nov. 24 (1).

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1919—*Judge Ray*

Haywood—July 7 (2); Sept. 15 (2).
Cherokee—Aug. 4 (2); Nov. 3 (2).
Jackson—Oct. 6 (2).
Swain—July 21 (2); Oct. 20 (2).
Graham—Sept. 1 (2); Dec. 1 (2).
Clay—Sept. 29 (1).
Macon—Aug. 18 (2); Nov. 17 (2).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. ..... Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. T. M. TURRENTINE, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

T. D. WARREN, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

GEORGE H. BELLAMY, United States Marshal, Raleigh.

S. A. ASHE, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1918

J. F. KEENER v. THE CITY OF ASHEVILLE.

(Filed 3 January, 1919.)

1. **Municipal Corporations — Cities and Towns — Streets — Grading—Damages—Statutes—Dedication—Presumptions—Negligence.**

An act providing that, in changing the grade of its street, an incorporated city shall cause a map to be made, showing the nature and extent of the proposed change, and, on request of an abutting owner, the mayor and aldermen shall cause a special jury, definitely provided for, to assess the owner's damages and benefits, and make report, upon which the authorities may decrease or remit items, or abandon the plan if the costs appear unsatisfactory, destroys the ordinary presumption that the right to thus grade the street passed to the city upon the original dedication of the street.

2. **Municipal Corporations — Cities and Towns — Streets and Sidewalks — Damages—Preliminary Assessment—Statutes.**

Where a statute provides a method, upon demand of an abutting owner, for ascertaining by a special jury the damages to be caused by a proposed grading or improvements of its streets, with report to the city board of aldermen, who may change the items or abandon the plan if the costs are unsatisfactory: *Held*, the requirement for the appointment of a jury and assessment and report, under the prescribed method, is not jurisdictional in its nature, but a preliminary proceeding before an administrative board to enable it to intelligently decide whether they would abandon or go on with the improvement, and, if they determine to proceed, to afford it opportunity to make an adjustment with the claimants and avoid the costs of adversary proceedings.

3. Same—Demand—Actions—Mandamus.

Where provision is made by statute for a preliminary investigation by an incorporated city to determine whether or not an improvement of its streets by grading, etc., should be made, upon demand by abutting owners, to whom a right of action for damages to their lands is given, and therein the board of aldermen act in an administrative capacity, the owner may bring his action to recover his damages thus caused, after making his demand upon the city, in accordance with the act, and a denial of any liability thereunder; and a *mandamus* to compel the board to proceed by the statutory method is not required.

4. Constitutional Law — Municipal Corporations — Streets and Sidewalks—Damages—Statutes.

An act giving to the abutting owners a right of action to recover damages caused to their lands by the grading by the city of its streets is constitutional and valid.

WALKER, J., dissenting; BROWN, J., concurring in the dissenting opinion.

ACTION tried before *Stacy, J.*, at April Term, 1918, of BUNCOMBE.

The action is to recover damages suffered by plaintiff, the owner of abutting real estate, by reason of a change of grade in John Street, in the city of Asheville, defendant having refused to make any adjustment of same on demand made pursuant to law. On denial of liability and of any proper demand for adjustment, the jury rendered the following verdict:

1. Were the lands and premises of plaintiff injured by the change of grade of John Street by defendant, as alleged in the complaint? Answer: "Yes."

2. Did plaintiff request of defendant an adjustment of the damage before the completion of said street improvement, as alleged in the complaint? Answer: "Yes."

3. What damages, if any, is plaintiff entitled to recover? Answer: "$250."

On the reading of the pleadings, a demurrer *ore tenus* was entered for lack of jurisdiction of the court to award recovery of damages sought, defendant contending that plaintiff should have pursued the statutory method, beginning by application to the board of aldermen, etc., as provided by the charter of the city of Asheville and acts amendatory of the same. This motion, renewed at the close of testimony, was allowed and the court entered judgment as follows:

"The court being of opinion that the plaintiff's remedy, if any, in this court at this time was by way of mandamus to compel the city to perform and exercise the duties prescribed by its charter for assessing benefits and damages for raising or lowering grades affecting abutting property, offered to strike out the verdict and allow the plaintiff the option of recasting his pleadings as for mandamus, or to stand upon the

verdict and record of the trial. The plaintiff made his election to stand upon the record and verdict and tendered judgment as appears in record. Thereupon the court sustained defendant's demurrer and dismissed plaintiff's action and ordered plaintiff and his surety to pay the cost of this suit."

Plaintiff excepted and appealed.

W. E. Shuford and Mark W. Brown for plaintiff.
Marcus Erwin for defendant.

HOKE, J. The statutes more directly relevant to the inquiry (Private Laws 1905, ch. 401, sec. 3, as amended by Private Laws 1909, ch. 46, and very correctly stated in Bourne's Codification of the Charter of the City of Asheville, sec. 242) provides that whenever the city determines to grade, pave and improve the streets and, in order to do so, it becomes necessary to raise or lower the grade of any street or streets of the city, a map shall be made of the proposed grade showing the profile and showing the nature and extent of the change as planned, and thereupon, on request of the abutting owner and before the completion of said improvements, the mayor and board of aldermen shall cause a jury to be summoned to assess the damages and benefits of the abutting property in the "same manner and under the same rules, regulations and provisions as now required by the charter and laws amendatory thereof for the assessments of damages to property where the streets are widened."

This portion of the charter referred to, appearing chiefly in the Private Laws of 1901, ch. 100, sec. 65, provides, in effect, that whenever streets are condemned or widened, etc., the mayor, on the direction of the board of aldermen, shall cause one of the policemen to summon a jury, assess the damages, and estimate the special benefits to the different pieces of property affected and make report to the board, who are authorized, on their consideration of the question, to decrease or remit any item of special benefits and to discontinue the improvements if the costs are shown to be unsatisfactory. In case they decide to go on with the improvements, any abutting owner dissatisfied with the amount allowed him may appeal to the Superior Court and have his damages assessed pursuant to law.

Considering this legislation as a whole, we are of opinion that it confers, and was intended to confer, on an abutting owner his right of action whenever by reason of a change of grade of the city streets, or any of them, substantial injury was done to his property, or rather it restores to such owner the right of action of which he was deprived on the supposition that this right had passed to the city at the time of the original dedication of the street, and further that this requirement for

appointment of a jury and assessment and report, under the direction of a city policeman, is not jurisdictional in its nature, but is to be properly considered a preliminary proceedings before an administrative board designed chiefly to enable the board of aldermen to intelligently decide whether they would abandon or go on with the improvement, and if they determined to proceed, that they might have opportunity to adjust the matter with the claimants and so avoid the costs of adversary proceedings.

In this view, the present case, we think, comes clearly within the recent decision of *Mason v. Durham,* 175 N. C., 638. There the county commissioners, in straightening a public road, had taken a strip of plaintiff's land. In an action to recover damages, defendants denied plaintiff's ownership of the land and, generally, his right of action, and on the hearing resisted recovery for the reason, among others, that plaintiff's remedy was in petition to the board of commissioners, as the statute provided, and it was held, among other things: "The county board of commissioners in acting upon a petition by the injured owner whose land had been taken for road purposes, under a statute providing for the assessment of damages by this method, does so in an administrative capacity; and where the board has taken and is using the land for such purpose, and the owner has not followed the special method provided and brings his action in the Superior Court for his damages, the defendant's denial of plaintiff's ownership and its liability for the damages waives its right to insist that the statutory method should have been pursued by the plaintiff."

Speaking to the subject in the opinion, the Court said: "Under our system, county commissioners are not clothed with judicial powers, and, representing the opposing side, they could not exercise them in such a case if they were. A petition to them, therefore, should be properly regarded as a preliminary step before an administrative board, and is in no sense jurisdictional in its nature. This being true, the defendants have waived their right to insist on such protection by an absolute denial of plaintiff's right, for by correct interpretation these pleadings do deny plaintiff's right and raise issues both as to her ownership of the land and as to the injury. Why attempt a petition to an administrative board who, on the record, have denied plaintiff's right and put her to proof on the essential questions involved?"

Under the principles approved in that case, it having been established that the city of Asheville has changed the grade of John Street, causing damage to plaintiff's property to the amount of $250; that plaintiffs demanded an adjustment of the damages before the improvements were completed, as the statute provides, and defendant refused to comply and continues to deny plaintiff's right, we are of opinion, and so hold, that

plaintiff is entitled to judgment on the verdict, and his exception for failure to award it must be sustained.

It is urged for a distinction between this and the *Mason* decision, that there the county had appropriated a portion of plaintiff's land, giving him a right of action at common law, while here, as no recovery is allowed for a change of grade in the street, the right is exclusively statutory, and the statutory remedy must be pursued; but we do not discover any substantial difference in the two cases. True, as held in many cases with us (*Dorsey v. Henderson,* 148 N. C., 423; *Jones v. Henderson,* 147 N. C., 120, and others) that no action ordinarily lies for a change in the grade of an established street unless the work is negligently done (*Harper v. Lenoir,* 152 N. C., 723)—this on the idea, chiefly, that in making such change the municipal authorities are in the exercise of a governmental function; but, as pointed out in *Wood v. Land Co.,* 165 N. C., 367, the ruling is based upon the presumption that the right to make such changes passed to the municipality at the time of the original dedication of the street either by condemnation or waiver, and thereafter the governmental authorities had a right to make such changes of grade as the public good might require. But so far as the city of Asheville is concerned, these statutes, amendatory of the charter, provide, and intended to provide, that on the dedication of the street the right passed and damages are to be allowed under existent conditions, and thereafter for any change of grade working substantial injury to the owner additional compensation should be made. They remove the presumption that formerly prevailed as to the extent of the right acquired and, in the respect suggested, restore to the property holder his rights of ownership. Such amendments are well within the legislative power, and now to make a substantial change of grade working harm to the abutting owners is to superimpose an additional burden and as much a trespass upon his rights as if there was an appropriation of his property. We regard the principles of the *Mason case* as decisive of the questions presented here, and this will be certified that judgment for plaintiff be entered on the verdict.

Reversed.

WALKER, J., dissenting: I cannot agree with the majority of my brethren who concur in the opinion of the Court, as much as I would like to do so, because my opinion is that the decision of this case is contrary to the law as established by a long line of our cases.

As my views were set forth in the dissenting opinion filed in *Mason v. Durham,* 175 N. C., at p. 643, it is not necessary that I should fortify my position by any elaborate discussion of the matter or by calling to my aid the numerous cases which have held that when a right is given

by statute, with a particular and adequate remedy to enforce it, any party who claims the right must pursue the remedy of the statute for its enforcement. The right which is claimed here for the assessment of damages resulting from a change of the street grade is a new one given by this statute and peculiar to the city of Asheville, and a specific remedy is also prescribed for its prosecution. If the city failed to proceed, the remedy was by compelling it to do so, and the courts have sufficient process for commanding a speedy compliance with such duty. The plaintiff is allowed to recover damages, as if in an action of trespass, and to ignore the sole remedy given to him with the right by the statute. This is entirely contrary to *McIntyre v. R. R.*, 67 N. C., 278, which until just recently has stood for many years as the law of this State. I said of it in the *Mason case, supra,* at p. 643: "I am unable to concur in the opinion of the Court as I think it overrules a long line of cases holding, upon the authority of *McIntyre v. R. R.*, 67 N. C., 278, that where there has been a condemnation of property for public use, the recovery of compensation by the owner for taking his property must be obtained through the particular remedy given by the statute, as the latter takes away by clear implication the common-law remedy, which was an action of trespass on the case and is a substitute for it. The opinion of *Justice Rodman* in that case also states that the landowner is by the statute impliedly 'deprived of his common-law remedy,' that being wholly superseded by the one given in its stead, which is a substantial and adequate one, and not merely illusory. It has been held ever since our Mill Act of 1809 that such is the law, and that the specific remedy for damages must be pursued."

The remedy provided by the statute is not administrative, but judicial, and has been so regarded in all the cases by this Court. But if it can be called administrative, the rule even then requires that the specified remedy should be first resorted to and exhausted. *Wilson v. Green,* 135 N. C., 343.

I will not extend the argument as the subject is fully treated in the *Mason case,* beginning at p. 643, and will content myself with what is there said.

I am authorized to say that *Justice Brown* concurs in this dissenting opinion.

P. W. BROOKS AND W. W. DAWSON v. J. C. GRIFFIN.

(Filed 3 January, 1919.)

Wills—Devise—Fee Simple—Restraint on Alienation.

A devise of lands to the testator's named children, for division, with provision they are not to sell any of the lands except to each other, it being his "desire that the lands shall descend to my grandchildren": *Held*, the testator's "desire that the land should descend to his grandchildren" was merely the expression of his wish, and not a legal limitation of the devise; but, were it otherwise, the devise would be to the children in fee simple, with a void restraint upon alienation.

APPEAL by plaintiffs from *Allen, J.*, at November Term, 1918, of LENOIR.

This was a controversy submitted without action. The facts agreed are that Benjamin F. Phillips, by his will, devised his 50-acre tract of land to his nine children, to be divided as follows: The residence and 2 acres he devised to his son, John T. Phillips, and directed that the remaining 48 acres should be divided into eight tracts of six acres each to his other children, providing also, "with the distinct understanding that the parts or parcels hereinafter allotted to each are not to be sold to any one by him, or them, except the right to sell to one of those above named (being his nine children), it being my desire that said land shall descend to my grandchildren."

C. C. Dunn, the husband of one of his daughters, named as a devisee in the will, purchased all the interests in said tract except the interest devised to his wife, taking deeds therefor, and he and his wife sold and conveyed the entire tract to the plaintiff, P. W. Brooks, in fee simple, and later said Brooks conveyed a one-half undivided interest to his coplaintiff Dawson. Said Brooks and Dawson conveyed the entire tract 23 December, 1913, to the defendant J. C. Griffin by a deed in fee simple with warranty, and the said Griffin executed to the vendors seven bonds in the sum of $500 each, three of which he has paid, but declines to pay the other four, alleging that the title to the land is defective. The court adjudged that the children of the devisor took as life tenants only, and that the land, under the will, goes in remainder to the children of the devisee, the grandchildren of said testator, to take *per stirpes* each on the death of the father or mother, the life tenant, and entered judgment against the plaintiffs for costs. Appeal by plaintiffs.

Y. T. Ormond for plaintiffs.
Dawson, Manning & Wallace for defendant.

CLARK, C. J. The only question presented in the construction of the following devise: "I give and devise to my children (naming them)

my tract of land where I now reside, containing about 50 acres, with the distinct understanding that the parts or parcels hereinafter allotted to each is not to be sold to any one by him or them, except the right to sell to one of those above named, it being my desire that the said land shall descend to my grandchildren." Then followed the directions for the allotment of the tract of land among the nine children. All these lots have been sold to others than one of the heirs, and thus came into the hands of the plaintiffs, who sold to the defendant, who refuses to pay the deferred notes for the purchase money upon the ground that the plaintiffs' warranty of title is invalid.

The words used do not make the devise to the children a life estate with remainder over, nor do they confer a defeasible fee as in *Whitfield v. Garris,* 134 N. C., 24. There are no words of defeasance, and the devise on its face is in fee simple.

We are further of opinion that the expression of the testator's wish that the land should "descend to his grandchildren" is the expression of his wish only, and not a legal limitation of the devise. But if it were otherwise, it is invalid as a restriction upon alienation.

In *Munroe v. Hall,* 97 N. C., 207, it was held that where land was conveyed with a proviso that the grantees "should not sell or dispose of the land in any way whatever," the proviso was repugnant to the fee-simple estate conveyed and was absolutely void.

In *Hardy v. Galloway,* 111 N. C., 519, it was held that a provision in a deed that the vendors "retain for themselves and their heirs and assigns the right to repurchase said land when sold" was an illegal restriction upon the right to alienation, and void, citing *Twitty v. Camp,* 62 N. C., 61, which held void a restriction upon a devisee that he should not sell or encumber his land before reaching 35 years of age.

In *Pritchard v. Bailey,* 113 N. C., 525, it was held, citing *Hardy v. Galloway, supra,* that a provision in a deed that the grantee shall not sell the property during her life was contrary to public policy, and void.

In *Latimer v. Waddell,* 119 N. C., 378, the above cases are cited with approval, and the Court held: "A condition annexed to the conveyance in fee simple, by a deed or will, preventing alienation of an estate by the grantee within a certain period of time is void." The restriction in that case was a prohibition to sell for five years. This is a well considered case by *Montgomery, J.,* and is printed in 3 L. R. A. (N. S.), 668, with full notes discussing the whole subject.

In *Wool v. Fleetwood,* 136 N. C., 460, by *Walker, J.,* the subject is again reviewed, with full citation of authorities and affirming the illegality of restrictions against alienation.

In *Christmas v. Winston,* 152 N. C., 49, the above authorities were again cited and approved in an opinion by *Brown, J.,* which holds that any restriction upon alienation is invalid.

It is held in an opinion by *Allen, J.*, in *Trust Co. v. Nicholson,* 162 N. C., 263, citing with approval the above authorities, that restrictions upon alienation are void.

In *Schwren v. Falls,* 170 N. C., 252, it was held that a provision in a conveyance that the grantee "shall not dispose of any part of the land unless she should become a widow and unless her necessity requires it, and then only with the consent of the executor was void as a restraint upon alienation."

In *Lee v. Cates,* 171 N. C., 721, the whole subject is fully reviewed by *Walker, J.*, summing upon the authorities above cited and others, and holding that a restraint upon alienation is invalid whether it applies to the equitable or legal title, stating that we adopted this rule from the English courts in *Dick v. Pickford,* 21 N. C., 480, and have consistently followed it ever since.

The only case in our Reports which has been considered at all hesitant on this question is *Ex Parte Watts,* 130 N. C., 237; but upon examination it will be found that it is not in conflict with the settled line of cases in our Reports. In *Ex Parte Watts* the devise by the mother was of her home place and lot to her four children "as a common home, with equal rights to the same, until twenty-one years after the death of herself and husband," and that *"then* they and their heirs are to own said house and lot in fee simple." There was a provision that if the house should be burned the insurance money should be used to build another house on the same lot, and a fund was devised for the purpose of keeping up the home. The Court held that by the evident intent of the will this was a devise, to such of them as should desire, of the use of the property for a home for a term of twenty-one years, with remainder after the expiration of said term to them as tenants in common in fee simple.

In 3 L. R. A. (1906), 668, *Latimer v. Waddell, supra,* is reprinted with the fullest citation of all the authorities in the notes. The learned editor points out that there are two lines of decisions, one holding that any restraint upon alienation of fee-simple title for a limited period, however brief, even for a day, is void for repugnancy, and that this is almost the universal rule, but that there are a few cases that a limited restraint upon alienation, if for a reasonable time, is valid. The authorities in this State, however, are uniform, as above stated.

It is a singular commentary upon human nature that, knowing the difficulty of managing to the best advantage one's own estate while living, with full knowledge of changing conditions, that any man should wish, or think himself competent, to restrict by deed or will the control of property in the hands of a grantee or devisee after the grantor shall have passed hence. No one can foresee the changing conditions which

may arise and which will require a change in the investment or in the management of property in the always uncertain future. Certainly the grantor or devisor should realize that after the property has passed from his hands, those who hold it should be credited with equal capacity, and in view of their superior knowledge of new conditions that they will be possessed of superior ability to select the best course to be taken with the property which has been conveyed to them by will or deed. It certainly seems irrational for a devisor to hold his own children incompetent to manage such property, but that his grandchildren, whom he does not know, shall possess sufficient ability. It is the vanity of human nature that one out of whose hands property is passing should seek to control it after it has ceased to be his.

For these reasons, and also because as a matter of public policy estates should be unfettered, the courts generally, and in this State uniformly, have held that restraints upon alienation of property conveyed or devised in fee simple are invalid. This does not in any wise affect the conveyance or devise of property upon a fee defeasible in which the defeasance depends upon a future or contingent event.

We are of opinion that the devise in this case is not of the life estate to the children of the devisor, with remainder to the grandchildren, the words of the devise cannot be so construed, but is of a fee simple to the children with at most a restriction (if it is not an expression merely of a wish) that they can convey only to one of their own number, and this is void. The plaintiffs, therefore, can convey a fee-simple title to the defendant.

Reversed.

TOWN OF CANTON v. J. A. HARRIS ET AL.

(Filed 3 January, 1919.)

1. Condemnation — Municipal Corporations—Cities and Towns—Damages—Statement of Owner—Evidence—Tax Valuation.

Where the value of lands taken by an incorporated town, in condemnation proceedings, is at issue, and the owner has testified as to their value, evidence of his own statement, made before the tax equalization board, that it was worth a much less sum, is competent in contradiction, and differs from instances wherein the value has been given in for taxation by the assessors, which, being the estimate made by others, is incompetent against the owner.

2. Condemnation — Municipal Corporations—Cities and Towns—Damages—Rejected Offers—Evidence—Appeal and Error.

Where the issue is presented as to the value of the owner's land, taken by an incorporated town in condemnation proceeding, testimony by a wit-

ness that he had offered the owner a greater price per acre than the value he claimed, in good faith, and was prepared to pay, and would have paid the price, had it been accepted, is too intangible and too uncertain as to the circumstances or conditions under which the offer was made, and its exclusion is proper.

3. Condemnation — Municipal Corporations — Cities and Towns — Separate Owners—Damages—Evidence—Appeal and Error.

Where there are several issues addressed to the value of tracts of lands separately owned by various parties, in proceedings to condemn them by a city, and it appears that the whole was a body of mountain land, composed of contiguous tracts of the same general nature, desirable for the same purposes, and much of it, throughout, of the same or similar values, the admission of incompetent and prejudicial evidence as to the value of some of the tracts is prejudicial to the others, and its admission constitutes reversible error as to them all.

THIS was a special proceeding under the statute applicable to condemn several tracts belonging to the respective defendants as necessary to protect the water supply of the town of Canton, and tried on issues before *Ferguson, J.*, and a jury, at July Term, 1918, of HAYWOOD. The jury rendered the following verdict:

1. What is the fair market value of the land of A. C. Walker taken by the plaintiff? Answer: "$16,921.09."

2. What damage, if any, has A. C. Walker suffered to the remaining portion of his tract of land? Answer: "$1,000."

3. What is the fair market value of the land of W. D. McCracken taken by the plaintiff? Answer: "$12,393.90."

4. What damage, if any, has W. D. McCracken suffered to the remaining portion of his tract of land? Answer: "$150."

5. What is the fair market value of the land of W. P. Ford taken by the plaintiff? Answer: "$14,204.68."

6. What damage, if any, has W. P. Ford suffered to the remaining portion of his tract of land? Answer: "$275."

7. What is the fair market value of the land of W. G. Ford taken by the plaintiff? Answer: "$2,256.25."

8. What is the fair market value of the land of J. A. Harris taken by the plaintiff? Answer: "$3,482.50."

9. What is the fair market value of the land of W. P. Harris taken by the plaintiff? Answer: "$2,490.62½."

10. What damage, if any, has W. P. Harris suffered to the remaining portion of his tract of land? Answer: "$175."

Judgment on the verdict, and plaintiff, the town of Canton, excepted and appealed.

Martin, Rollins & Wright and J. T. Horney for plaintiff.
Lee & Ford, Morgan & Ward, and T. A. Clark for defendant.

HOKE, J. Appellant's objections are chiefly to the rulings of the Court on questions of evidence:

1. That defendant W. D. McCracken, who had testified that in his opinion the lands of the witness condemned for the purpose was worth $175 to $200 per acre, admitted on cross-examination that he had appeared before the equalization board on the last assessment for taxes and tried to have the valuation of his land reduced. He was then asked: "To what figure did you try to get it reduced?" and on objection the question was excluded and plaintiff excepted. Witness was then asked: "What assessment did you ask the commissioners to put upon your land?" Answer: "The same they had in Buncombe." Question: "The figure?" On objection this was excluded and exception taken. It was stated as the purpose to show by the witness that he had insisted on having the land in question valued at $8 per acre.

There was marked discrepancy in the evidence of the opposing parties on the question of value, that of defendants tending to show that much of the land, as stated, was worth $175 to $200 per acre, that of plaintiff putting it at a much lower figure. The testimony of this witness, the owner and supposed to be familiar with the uses and worth of the land, was well calculated to have great weight with the jury, and this proposed evidence having, as it did, a direct tendency to challenge or weaken the estimate of the witness, was of the first importance on the issue, and in our opinion its exclusion must be held for reversible error. We are not unmindful of the ruling that the value of land as assessed in the tax list is not ordinarily evidence against the owner on the question of values, he having no part in fixing such valuation (*R. R. v. Land Co.,* 137 N. C., 330), but in this instance it was the act of the owner that was offered in evidence tending to show a lower estimate than the one given by him before the jury.

Again, the witness A. C. Walker, testifying to the value of his land, was allowed to say that he had been offered $200 per acre for it within two years of the trial, and by one W. T. Shelton, who was financially able to comply. Plaintiff excepted and the said W. T. Shelton, over plaintiff's objection, was allowed to testify that he had made an offer of $200 for A. C. Walker's land, and he was able to pay for it and made the offer in good faith. An unaccepted offer of this kind may be influenced by so many considerations entirely foreign to such an issue, and may put the opposing party at such disadvantage, affording him, as it does, no fair opportunity to either anticipate or combat it, that its reception as evidence has been very generally disapproved by the authorities on the subject. *Sharp v. United States,* 191 U. S., 341; *Fowler v. Comrs.,* 88 Mass., 92-96; *Hine v. Manhattan Ry. Co.,* 132 N. Y., 477; *Park v. City of Seattle,* 8 Wash., 78; *Santa Anna v. Harlan,* 99 Cal.,

538; *St. Joseph, etc., Ry. v. Orr,* 8 Kan., 419; *Minn., etc., Ry. v. Gluck,* 45 Minn., 463; *Horner v. Beasly,* 105 Md., 193; *Western Union v. Ring,* 102 Md., 678; *Jonesville, etc., Ry. v. Ryan,* 64 Miss., 399; Lewis Eminent Domain (3d Ed.), sec. 666; 1 Elliott on Evidence, sec. 181.

In *Sharp v. United States, supra,* a condemnation proceeding, where the question of value was directly presented, some of the objections to such testimony, in the case of real estate, are stated by *Associate Justice Peckham* as follows: "Upon principle, we think the trial court was right in rejecting the evidence. It is at most a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might in the end prove profitable. There is no opportunity to cross-examine the person making the offer to show these various facts. Again, it is of a nature entirely too uncertain, shadowy and speculative, to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exist) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible, to show. To be of the slightest value as evidence in any court, an offer must of course be an honest offer made by an individual capable of forming a fair and intelligent judgment really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark not intended for acceptance, would also be material upon the question of the *bona fides* of the refusal. Oral and not binding offers are so easily made and refused in a mere passing conversation and under circumstances involving no responsibility on either side as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment, they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject."

In jurisdictions where this is the prevailing rule, the rare instances in which the position is apparently departed from are chiefly cases of

personal property or stocks having a recognized market value and for reasons that are not usually present in the determination of land values. McKelvey on Evidence (2d Ed.), 264-265. Approving this as the general rule where the values of realty are concerned, we are of opinion that on the facts presented this evidence of a particular offer to purchase the Walker land is incompetent and its reception must also be held for error.

In *Brown v. Power Co.,* 140 N. C., 333-337, the only testimony considered that in any way militates against this position seems to have been admitted without objection. And in *Boggan v. Horne,* 97 N. C., 268, the price paid in the actual purchase of a horse in open market was admitted in evidence as an "act done and tending to impart force to the estimate of value" and both in the character of the property and the conditions presented differs from the testimony received on the present issue. And in 3d Chamberlain, sec. 2175 g, to which we were also referred, the learned author does not seem to regard such evidence as of much probative force, and in the note on the subject recognizes that there is high authority against its admission.

It was urged on the argument that if there was error in these rulings of the court, its effect should be restricted to valuation of the Walker and McCracken lands, the issues to which the evidence was more especially addressed, but a perusal of the record will disclose that this was a body of mountain land, composed of contiguous tracts of the same general nature and desirable for the same purposes, and much of it throughout of the same or similar values, and these, with other witnesses, giving their testimony as to all of the tracts, their evidence would naturally and well-nigh necessarily have weight with the jury in their consideration and decision of all the issues.

For the errors indicated, we are of opinion that there should be a general new trial, and it is so ordered.

New trial.

J. W. NOLAND v. R. E. OSBORNE.

(Filed 3 January, 1919.)

1. Deeds and Conveyances—Personal Property—Title—Equity—Mortgage.

A paper-writing purporting to convey the absolute title to personal property, but, by its express terms, was given as security for a debt, upon condition that the title would vest in the creditor upon the payment thereof, will be regarded in equity as a mortgage, with the right of redemption at any time before foreclosure.

2. Usury—Counterclaim—Issues— Instructions— Verdict Directing— Appeal and Error.

The debtor may set up the defense of usury in the creditor's action to recover the debt, and an instruction therein that the jury find the issues for the plaintiff if they believe the evidence, without submitting an issue tendered as to the counterclaim, is a denial of this right, when pleaded with supporting evidence, and constitutes reversible error. *Carey v. Hooker*, 171 N. C., 229, and other like cases, cited and distinguished.

ACTION to recover certain personal property, tried before *Lane, J.*, at January Term, 1918, of HAYWOOD.

The ancillary remedy of claim and delivery was sued out and the defendant gave bond as required by the statute and retained possession of the property in controversy.

These two issues were submitted to the jury:

1. Is the property described in Exhibit A, except the one bay horse, two years old, the absolute property of the plaintiff, as alleged in the complaint, and is plaintiff entitled to the possession thereof? Answer: "Yes."

2. Is the plaintiff entitled to the possession of the two mules described in Exhibit B, to this complaint, for the purpose of selling the same under his chattel mortgage described as Exhibit B? Answer: "Yes."

The court charged the jury that if they believed the evidence to answer the issues as indicated. The defendant excepted. There was no controversy as to the value of the property, and those issues were answered by consent. The paper referred to as Exhibit A reads as follows:

STATE OF NORTH CAROLINA—County of Haywood.

Know all men by these presents, that R. E. Osborne, of the county and State aforesaid, in consideration of the matters and things hereinafter set forth, has this the 9th day of February, 1916, bargained and sold, conveyed, and hereby delivered to J. W. Noland, of the county and State aforesaid, the following described personal property, to wit: One pair of mules, consisting of one gray mule about 6 years old and known as the "Sebe Bryson mule," and one bay mule about 9 or 10 years old and known as the "Dan Owen mule," one iron-gray horse known as "Buster," one yoke of oxen about 6 years old and known as the "Jim Plott cattle," one red ox and one white spotted ox, four milk cows (two of which are red, one roan, and one spotted), one bay horse 2 years old: To have and to hold the above described property unto the said J. W. Noland, his executors, administrators and assigns.

The above described property is hereby conveyed to the said J. W. Noland for the following reasons and purposes and upon the following terms and conditions, to wit:

Whereas, the said R. E. Osborne has this day executed and delivered to the said J. W. Noland his note of even date herewith in the sum of six hundred and three dollars and ninety-three cents ($603.93), becoming due and payable on the 1st day of June, 1916, with interest thereon from date until paid at the rate of six per cent per annum, and the said R. E. Osborne desires to secure the payment of the said note and interest by the conveyance of the property above described.

Now it is the purpose of this bill of sale that if the said note and interest be not paid at the maturity thereof by the said R. E. Osborne, or some one for him, then the property hereby conveyed shall vest absolutely in the said J. W. Noland; but if the said note and interest shall be paid in full at the maturity of the same, then this bill of sale shall be null and void and the absolute property in and to the property hereby conveyed shall revest in the said R. E. Osborne.

And the said R. E. Osborne hereby warrants that the said personal property hereby conveyed is his own absolute property, and is free and clear of all liens and encumbrances whatsoever.

In witness whereof, the said R. E. Osborne has hereunto set his hand and affixed his seal, this the 9th day of February, 1916.

R. E. OSBORNE. (SEAL)

The court rendered judgment against defendant and the sureties on the replevy bond, from which defendant appealed.

W. J. Hannah for plaintiff.
Morgan & Ward for defendant.

BROWN, J. The plaintiff, in his complaint, claims the absolute ownership of all the property described in Exhibit A, and the conditional ownership of that described in Exhibit B, which is in form an ordinary statutory chattel mortgage with the usual power of sale.

The defendant, answering, avers that Exhibit A was executed to secure a note and was intended by the parties to be a mortgage, and not to convey the absolute title to the property. The defendant also sets up the plea of usury, and alleges that the note described in Exhibits A and B is usurious, and avers that if the usury is eliminated there will be nothing due on the debt.

It is useless to discuss the many exceptions to evidence relating to the attempt of the defendant to prove by parol evidence that Exhibit A was intended as a mortgage securing a debt, for in our opinion the instrument upon its face is a mortgage.

Courts of equity began at an early date to look with disfavor upon the strict doctrine of the common law as to the absolute forfeiture of

the mortgaged property upon nonpayment of the mortgage debt. Accordingly, the rule has become firmly established that the debtor has a right to redeem after breach of the condition and at any time before actual foreclosure of his equity of redemption.

It is patent upon the face of Exhibit A that it is a security for a debt, and whenever a transaction is substantially a security for a debt it is a mortgage and the debtor has a right to redeem, although he failed to meet the condition and pay the debt at maturity (*Watkins v. Williams,* 123 N. C., 171; *Robinson v. Willoughby,* 65 N. C., 520; Adams Eq., 112); consequently the judge erred in his instruction to the jury. This erroneous instruction renders a trial *de novo* necessary, as the effect of such ruling was to deprive the defendant entirely of the benefit of his defense of usury, which he was entitled to have submitted to the jury upon appropriate issues and instructions.

This is not a case where the debtor comes into court charging usury and seeks its aid to prevent a foreclosure or asks other equitable relief against a mortgagor. Therefore the principle laid down in *Cook v. Patterson,* 103 N. C., 130; *Gore v. Lewis,* 109 N. C., 540; *Corey v. Hooker,* 171 N. C., 229, and other similar cases, has no application.

In this case the creditor seeks to enforce by the aid of the court the collection of his alleged usurious debt. In such case the defendant, if he alleges usury as matter of defense in proper and sufficient manner, and establishes it, is entitled to have the full measure of it as allowed by the statute. *Gore v. Lewis, supra; Riley v. Sears,* 154 N. C., 509.

New trial.

D. B. LEWIS v. J. P. MURRAY.

(Filed 3 January, 1919.)

1. Statute of Frauds—Lands, Contracts to Convey—Specific Performance—Vendor and Purchaser—Equity.

Under our statute (Revisal, sec. 976), requiring, among other things, that a contract to convey lands shall be void unless it, or some note or memorandum thereof, shall be put in writing and signed by the party charged, etc., the "party to be charged" is the one against whom relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the other could not be held, because as to them the statute of frauds is not fully complied with.

2. Contracts — Vendor and Purchaser — Specific Performance — Consideration—Evidence.

In a suit against the vendor in a contract to convey lands, it is not necessary to the purchaser's right for specific performance that the consideration appear in the writing.

3. Contracts—Lands—Vendor and Purchaser—Written Contracts—Subject-matter—Parol Evidence.

A contract to convey lands must contain, expressly or by necessary implication, the essential features of an agreement to sell, and describe the lands with reasonable certainty, affording data, in itself or by reference to some other written paper, that will enable the court, with the aid of extrinsic evidence, to identify the property, the subject-matter of the contract.

4. Same—Specific Performance—Consideration.

A paper-writing, expressing upon its face the following: "Received on account of trade on home place $100 from" a certain named person, and signed by the vendor, is a sufficient contract to convey to enforce specific performance at the suit of the vendor, permitting evidence to show the purchase price, and that, of several separate tracts of land owned by the vendor in the county, there was only one of them on which he lived, and known as the home place, and that the description in the instrument corresponded therewith.

ACTION tried before *Connor, J.*, and a jury, at February Term, 1918, of ROBESON.

The action is to enforce specific performance of a contract to sell land on the following paper-writing signed by defendant:

BARNESVILLE, N. C., 10/18/1917.

Received on account of trade on home place, $100.00, one hundred dollars. From D. B. Lewis. J. P. MURRAY.

Witness: W. C. WALTERS.

There was accompanying evidence on the part of plaintiff tending to show that plaintiff, on 18 October, 1917, bought the place on which defendant lived, and where he had lived for fifteen years past, for $1,600 and paid him $100 on the purchase price and, taking the receipt as above set out, had been ready and able to pay balance of amount, and told defendant this, who said he would have the deed drawn in a few days, but later had failed and refused to comply further. There was further evidence on the part of plaintiff tending to identify the place, and that it was known and called the "Home Place." There was also evidence to the effect that while defendant owned two other tracts of land in the county (a 50- and a 70-acre tract), he had never lived on either, and this place was a piece of land in Barnesville, Robeson County, North Carolina, bought by defendant of R. R. Barnes, and was the home place as referred to and described in the deed.

Defendant in his answer denied any obligation to convey the property and insisted that there was no contract in writing, as required by the statute, and alleged a tender and refusal of the one hundred dollars.

At the close of the testimony, the court being of opinion that no sufficient contract or memorandum had been shown, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

McLean, Varser & McLean for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

HOKE, J. The portion of our statute of frauds applicable to executory contracts to sell and convey land (Revisal, sec. 976) provides that these and certain other contracts specified therein shall be void unless said contract, or some note or memorandum thereof, be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized.

In various decisions construing the statute, it is held that the "party to be charged" is the one against whom relief is sought; and if the contract is sufficient to bind him, he can be proceeded against though the other could not be held, because as to him the statute is not sufficiently complied with. As expressed in *Mizell, Jr., v. Burnett,* 49 N. C., 249: "Under the statute of frauds, a contract in writing to sell land, signed by the vendor, is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser."

Again, it is held that where the action is against the vendor, it is not required, for the validity of the contract, that the consideration appear in the writing. This position, a departure from the English decisions on the subject, was approved and sustained in a learned and notable opinion by *Chief Justice Ruffin* in *Miller v. Irvine,* 18 N. C., 103, and has since been accepted with us as the correct interpretation of the law. Subject to these rulings, it is recognized that the written contract or memorandum must contain expressly or by necessary implication the essential features of an agreement to sell, and it must describe the land with reasonable certainty, affording data in itself or by reference to some other written paper that will enable the court, with the aid of extrinsic evidence, to identify the property, the subject-matter of the contract. *Bateman v. Hopkins,* 157 N. C., 470; *Farmer v. Batts,* 83 N. C., 387.

Applying these principles, we are of opinion that the paper-writing declared on is in full compliance with the statutory requirements. The party to be charged in this instance being the vendor, the consideration, as we have seen, need not be stated. The words clearly import that there was a contract for the sale of the vendor's home place to plaintiff. This is not only a permissible and accepted definition of the word "trade" in a transaction of this character (*May v. Sloan,* 101 U. S.,

231; 8 Words and Phrases, 7037), but such an interpretation is put beyond question by the language in which it is expressed: "Received on account of trade on home, $100, from D. B. Lewis. (Signed) J. P. Murray"—language fully as significant of a contract of sale between the parties as that upheld in the well-considered case of *Bateman v. Hopkins, supra,* and *Mfg. Co. v. Hendricks,* 106 N. C., 485, and approved as sufficient against the vendor in *Hall v. Meisenheimer,* 137 N. C., 183. And, under the authorities more directly relevant, the terms are sufficiently definite to identify the property, the subject-matter of the trade, and to permit the aid of parol testimony in fitting the description to the land sold. *Bateman v. Hopkins, supra; Mfg. Co. v. Hendricks, supra; Thornburg v. Masten,* 88 N. C., 293; *Farmer v. Batts,* 83 N. C., 387; *Simmons v. Spruill,* 56 N. C., 9; 29 A. & E. Enc. (2d Ed.), 866.

In this last citation, the general principle is correctly stated as follows: "A contract for the sale of real property must contain a description of the land to be sold, but it is not necessary that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary. The doctrine *'Id certum est quod certum riddi potest'* applies, and if the designation is so definite that the purchaser knows exactly what he is buying and the seller knows what he is getting, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough."

In *Simmons v. Spruill* the instrument designating the land as that "whereon the vendor resides," or the A. B. farm, was held to be sufficient. And in *Farmer v. Batts* the Court, giving a number of illustrations where the contract was enforced, refers to *Hurly v. Brown,* 98 Mass., 545, and other authorities as follows: "So a receipt of fifty dollars in part payment of a house and lot of land situated in Amity Street, Lynn, Mass., the full amount is seventeen hundred dollars," the defendant being shown to own no other real estate on that street except the lot, was declared to be binding and a specific performance enforced in *Hurly v. Brown,* 98 Mass., 545, and the Court say: "The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own."

In the subsequent case of *Mead v. Parker,* 115 Mass., 413, where the writing was in these words, "This is to certify that I, Jonas Parker, have sold to Franklin Parker a house on Church Street for the sum of fifty-five hundred dollars," the Court held that evidence was competent to show what house the defendant owned on Church Street, and decreed specific performance of the contract, remarking as follows: "The most specific

and precise description of the property intended requires some proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement."

"Every valid contract," says Mr. Fry in his work on specific performance, sec. 209, "must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence." To the same effect, Pomeroy on Contracts, sec. 90, note.

In *Burns v. Starr,* 165 N. C., 657, cited for defendant, the note was for so much money "for land," and it was held that the same was not a sufficient memorandum within the meaning of the statute, as the terms did not sufficiently import an agreement to sell, nor did it sufficiently describe the property. And in *Hall v. Meisenheimer,* action was against the purchaser and relief was denied because the writing contained no evidence of the contract on his part. If the party sued in that case, the party to be charged had been the vendor, as in this, the decided intimation is that the writing was a sufficient memorandum under the statute.

There is error in the judgment of nonsuit, and this will be certified that the case be submitted to the jury on appropriate issues.

Error.

J. C. LITTLE, RECEIVER, v. BENJAMIN FLEISHMAN ET ALS.

(Filed 3 January, 1919.)

1. **Receivers—Corporations— Vendor and Purchaser— Contracts— Tender— Actions.**

   Where the receiver of a corporation takes possession, without order of court, of its stock of merchandise in the hands of a purchaser, who has acquired the title and is ready, able and willing to pay the agreed price, and tenders the merchandise to the purchaser, the tender so made is unnecessary, and the only remedy of the receiver against the purchaser was to demand payment of the price, and upon refusal to sue for its recovery.

2. **Receivers— Corporations— Orders— Jurisdiction — Corporate Property— Personal Liability.**

   An order of the court directing the receiver of a corporation to take possession of property not belonging to the corporation exceeds its jurisdiction and will not protect the receiver acting under it.

3. Receivers— Corporations— Vendor and Purchaser — Contracts — Sales— Consideration—Actions.

Where a receiver of a corporation has taken possession of, and sold under an order of court, a stock of goods which the corporation had previously sold and passed title to the purchaser, the purchase price remaining unpaid, the order of court and the act of the receiver thereunder was wrongful to the purchaser, destroying the subject-matter of the contract and working a failure of the consideration, and a recovery by the receiver against the purchaser for the contract price, or any part thereof, would be inequitable and unjust.

4. Vendor and Purchaser—Sales—Title—Contracts.

Semble, where a corporation has sold and delivered its stock of goods, and the contract has been fully performed with the exception of the payment of the agreed purchase price, which the purchaser was ready, willing and able to do, but refused to do so upon the appointment of a receiver, the title to the merchandise passed to the purchaser from the corporation.

5. Receivers — Corporations — Vendor and Purchaser — Tender — Wrongful Act—Motive.

Where the receiver of a corporation has wrongfully taken possession of its stock of merchandise which the corporation had previously sold to a purchaser, the motive of the receiver cannot change the legal quality of his wrongful act.

6. Receivers—Corporations—Vendor and Purchaser—Sales in Bulk—Statutes—Waiver.

Where the merchandise of a corporation has been sold by it in bulk without complying with the statute, Revisal, sec. 964a, and a receiver has been thereafter appointed by the court, a tender of the merchandise by the receiver to the purchaser, after the latter had refused to take them, is not a waiver by the creditors of the corporation of the compliance with the statute, and an undisclosed purpose of the creditors to that effect is insufficient.

7. Receivers—Statutes—Merchandise in Bulk—Sales.

The provision in Revisal, sec. 964a, as to sales of merchandise in bulk, that the act shall not apply, among other things, to sales by receivers, etc., does not apply where a corporation has sold its merchandise in bulk before the appointment of a receiver, but only to a sale by the receiver, etc.

8. Corporations— Goodwill— Assets— Consideration — Receivers — Corporations.

Where a mercantile corporation has sold its stock of goods, together with its goodwill as a going concern, and before the payment of the purchase price a receiver has been appointed, who takes possession thereof, destroys the goodwill, and sues the purchaser for the agreed purchase price, after making tender of the merchandise, the goodwill is regarded as a material inducement and consideration for the contract of sale, and upon a failure of performance in this respect the purchaser may refuse the tender and performance on his part.

9. Corporations—Goodwill—Value—Receivers—Equity.

Where the receiver of a corporation has taken possession of its merchandise for its creditors and destroyed its goodwill as a going concern,

he may not in behalf of the creditors enforce a contract of sale of the property and goodwill of the corporation made before his appointment, and, taking advantage of the wrong done the purchaser, assert that the goodwill was valueless.

10. Corporations—Goodwill—Value—Evidence—Receivers.

Where a corporation has sold its merchandise and business as a going concern, and thereafter a receiver is appointed, who wrongfully takes possession and sells the goods at a much less sum, it is evidence of loss of value caused by the destruction of the goodwill of the concern.

ACTION tried before *Calvert, J.*, at July Term, 1918, of WAKE.

The action was brought by the plaintiff, as receiver of the Raleigh Department Store, Inc. (hereinafter called the store), to recover of the defendants the sum of $2,621.56, which he alleges to be due to him as receiver, it being the difference between the net proceeds of the sale of a stock of goods sold by him officially, viz., $7,427.10, and the price of the stock which, as he alleges, the defendant agreed to pay the store for the same.

The defendants denied the liability, and averred that the contract of sale had not been completed; that the stock of goods were sold in bulk by the store, and the provisions of Revisal, sec. 964a were not complied with, that the creditors, by their own unauthorized and illegal action, defeated the consummation of the contract by taking the goods from the possession of the defendants' servant, who had been placed in charge by them; that while the parties—that is, the defendants and the store—were engaged in closing up the contract, and before the purchase price had been paid, plaintiff, at the instance and request of some of the creditors, was appointed receiver in an action commenced by them in the Superior Court of Wake County, and took the goods from the possession of defendants' caretaker, afterwards selling the same for a greatly reduced price at public auction. Defendants claimed that not only were the goods contracted to be sold to them, but also the goodwill of the Department Store, which, at the time, was a going concern, although somewhat embarrassed financially; that by the plaintiff's action, as above described, the main purpose of the parties in making the contract of sale was altogether frustrated, and the contract became valueless to the defendants, the consideration upon which it was based having utterly failed.

Plaintiff contended that he took possession of the goods for the purpose of tendering them to the defendants, in furtherance of a due execution of the contract, intending that upon payment of the price by the defendants, to wit, $10,308.68, to deliver the goods to them, and that afterwards, on 11th or 12th September, 1918, the court made an order to that effect. The price, by agreement of the parties to the contract,

was to be paid in the city of Baltimore, and while in that city for the purpose of arranging some matters with a view to the payment of the money the suit was brought in Raleigh and the receiver appointed, whereupon the defendants, as soon as notified of the receivership, renounced the trade and refused to proceed further with the contract and rescinded the same. This was done on 4 September, 1918, and it was afterwards, on 11 September, 1918, that the court by its order appointed plaintiff permanent receiver and directed him to tender the goods to the defendant. Plaintiff, as temporary receiver, had on 31 August, 1918, been given "authority to take possession of the property, assets and effects of the Raleigh Department Store, Inc., and hold the same subject to the further order of the court," and plaintiff on 1 September, 1918, qualified as receiver and took possession of the goods, as before stated.

The parties waived a jury trial and consented that the judge should find the facts, which was done, the findings being mainly in favor of the defendants, and the judgment being rendered upon the facts for them. Other facts will be found in the opinion of the court. Plaintiff appealed.

J. H. Pou and John W. Hinsdale for plaintiff.

R. W. Winston, J. Crawford Biggs, and Baldwin & Sappington for defendants.

WALKER, J., after stating the facts: The goods were delivered to the defendants at Raleigh, where the business of the Raleigh Department Store had been conducted, and remained in the store under the care of a servant of the defendants. The plaintiff contends in two of its assignments of error, and in its brief, that the title thereby passed to the defendants. If this be so, the receiver had no right to take possession of the goods, nor did the court have any power to make the order requiring him to do so. If the title was in defendants, even the plaintiff, acting as receiver, and under an order of the court in a suit to which defendants were not parties, could not seize the goods. He could not do so for the purpose of tendering them to the defendants under the contract of sale, because he could not tender defendants' own goods to them; and, besides, when he seized the goods, no order of the court requiring a tender to be made had been granted. It may further be said that no tender was necessary, as the goods were already in the possession of defendants, and the defendants, as we have stated, contended that the title had thereby vested in them. The only remedy of the receiver was to demand payment of the price, and if the demand was refused, to sue for its recovery. It was a very simple remedy, as the defendants were not only perfectly solvent, but, to use plaintiff's own description of their financial rating,

as set forth in his brief, they were, as a firm, a "strong, wealthy and successful concern."

A court cannot, by ordering a thing to be done, such as the seizure of property, make it lawful for its receiver to do it, when the property belongs to another, and not to the insolvent concern, whose assets only are subject to its custody. It exceeds its jurisdiction, and its order is invalid and confers no lawful authority to seize the property. In this view of the case, that the title passed to the defendants when it received possession of the goods of the Raleigh Department Store, Inc., the court, by its order and through its receiver, having caused the property to be wrongfully taken, would not permit its receiver to recover the price of the goods, or any part of it, in a case like this, because by seizing and selling them it has destroyed the subject matter of the contract and worked a failure of the consideration, upon which the promise to pay the price of the goods was based. It would be unjust and inequitable to permit a recovery under such circumstances. The property was taken innocently, as no wrong was intended, but in a legal sense it did not affect the defendants' right to it, though they lost the possession.

Excluding from consideration at present the bulk-sales law and its effect upon this contract, we are disposed to agree with the plaintiff's contention, as stated in his brief, that the title did pass by the delivery of the goods to the defendants in the store at Raleigh, and their exercise of the right of ownership by placing their servant in charge of them, the price being fixed, and the parties having gone to Baltimore for the purpose of paying the money there to the creditors of the department store. *Phifer v. Erwin,* 100 N. C., 69; *Wittowsky v. Wasson,* 71 N. C., 451; *McArthur v. Mathews,* 133 N. C., 143; *Foley v. Mason,* 3 Md., 37; *Leedom v. Phillips,* 1 Yeates (Pa.), 527.

There was nothing to be done by the buyer or seller as a condition precedent, or concurrent, upon which the passing of the property in the goods depended. When there is such a condition, and it is unperformed, the title, of course, will not pass, even though the goods may have been left in the possession of the buyer, and this is according to the third rule of Mr. Benjamin in his Treatise on Sales, 318, as explained in *Hughes v. Knott,* 138 N. C., at p. 110. The buyers had the goods and were ready to pay the price. This but exhibits more clearly the mistake in seizing the goods, which belonged to the defendants, and which the receiver had no right to take and the court no power to order them into his possession. His plain and only remedy was to sue for the price, and in doing so he perhaps might have attached the goods, as defendants were nonresidents, but this he did not do; and one cannot gain possession of property belonging to another than the debtor, and apply it, or its proceeds, to the satisfaction of a debt due by the latter, who was the

former owner, there being no fraud alleged or shown in the passage of the title. *Smith v. Young,* 109 N. C., 224. It may also be said that by seizing the goods he left the matter open to the defendants to accept it, if so minded, as an act of rescission, and the defendants did so treat it by refusing to complete the execution of the contract. It can make no difference what plaintiff's motive was in seizing the property of the defendants, for his motive, however good or commendable, cannot change the legal quality of his act. Under certain circumstances not now presented, it could affect only the damages (38 Cyc., 1002 and 1003), and the tender of the goods likewise could only go in mitigation of damages, if there was a legal tender at all. *Ward v. Moffitt,* 38 Mo. App., 395.

We will now consider the case upon the assumption that there was no vesting of the title to the goods in the defendants, but that the contract had not passed out of its executory stage, as the parties have dealt with it on this assumption in their briefs and the argument before us, and have devoted a large part of their attention and discussion to that feature of the case.

The judge finds as facts that while the defendants were in Baltimore preparing to pay the price of the goods, for the purpose of its distribution among creditors, the receiver was appointed and took possession of them, without any notice to the defendants, and the latter did not acquire any knowledge of it, nor were they in any way notified of the receivership until 4 September, 1918, when they at once repudiated the contract and refused longer to be bound by it. He also finds that what was done tended to discredit the business of a going concern, and would give to the property the reputation of a bankrupt stock of goods and impair the goodwill and diminish the value of the stock as one to be thereafter sold in the retail trade, which was the understanding and purpose of the parties in making the contract—that is, that the goods were bought from a going concern to be sold by defendants in continuation of the business at the same stand as an active, solvent concern, with the advantage of the goodwill of the seller. The tender of the goods was not made, or ordered to be made, until several days after the defendants had repudiated the contract; and it also appears that the "bulk sales" statute, before cited, was not complied with, though plaintiff contends that a receiver could waive compliance with the statute and pass a good title, as against creditors, to the defendants. We are of the opinion that he could not, as at the time the defendants refused to comply with the contract, and before the plaintiff was authorized to tender the goods, all of the creditors had not waived objection to the sale, and the conditions set forth in the statute had not been performed. The judge expressly finds as a fact that before the appointment of plaintiff as temporary receiver no creditor had consented to the sale to defendants, except the Baltimore

Bargain House, and after he was appointed there was no objection to the sale except by two, as to the payment of the price in Baltimore, instead of in Raleigh. This is not what the law required. The finding means, at most, that there was merely an undisclosed purpose not to disapprove and no formal and express waiver of objection, as there should have been.

Revisal, sec. 964a, declares that a bulk stock sale shall be *prima facie* fraudulent and void unless certain things are done by the seller, and these conditions precedent confessedly were not complied with, as we have said. The buyers were not required to rely upon the unexpressed intentions of the creditors, but were entitled to a positive waiver of these requirements, one upon which defendants could safely rely, if that would have been sufficient. But the plaintiff contends that the statute does not apply to receivers. That part of it reads: "Nothing herein shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply *to sales* by executors, administrators, receivers or assignees under voluntary assignments for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process." (*Italics ours.*) It is manifest that the exceptions named in the section are restricted to sales made by those persons or officers. This sale was not made by the plaintiff, but by the department store, before he was ever appointed, and is not exempted by that clause. The sale could then have been avoided by any one creditor, and therefore it was not at the time the defendants repudiated it a valid contract, or such a one as required them to accept a tender of the goods or to pay the price. Besides, at the time of the tender, the value of the goods and the goodwill, which clearly passed and was clearly intended by the parties to pass by the transactions to the defendants, were so impaired—and by the conduct of the creditors in bringing suit having a receiver appointed and seizing the goods—that even if otherwise bound by the contract the defendants had a right to refuse the tender and performance of the contract. 6 R. C. L., sec. 380, 381; 13 Corpus Juris., sec. 721, 724, 733; 9 Cyc., 631; Clark on Contracts (2d Ed.), pp. 474, 475, 476, 479.

The Court finds that "the goodwill of the going concern was a valuable asset and a material inducement to and consideration of the contract." Plaintiff insists that the destruction must be of all or a material part of the property, and that depreciation must be substantial, in order to give the purchaser the right to rescind. We think this was the case, even regardless of the special findings. Our common-sense, observation and experience teaches us that much. It does not require technical knowledge or skill for that purpose. The conduct of the creditors, acting through the court and the receiver, was bound to seriously impair

the benefits to be derived from the contract, including the goodwill, and was well calculated to entirely defeat its object and purpose, as understood by the parties.

As to the "goodwill," which evidently passed as it was a general sale of the store's assets, we may accept plaintiff's definition of it as being "the probability that former customers will resort to the old stand," and we still think it was a thing of value. (*Bloom v. Home Ins. Agency,* 121 S. W., 293; 91 Ark., 367, cited by plaintiff). But the latter's counsel contended that impairment of the goodwill was not sufficient ground for a rescission of the contract or its nonperformance. Granting this to be true, for the sake of argument, the virtual destruction of the goodwill and the property by its complete and wrongful appropriation must surely be sufficient.

Again we say that the plaintiff pursued the wrong course, for which the defendants are not responsible, and should not be made to suffer. The creditors, through the plaintiff, will not be heard to assert that the goodwill was of no value when it was their own fault that it was rendered valueless. If they had not interfered and prevented a complete execution of the contract, it would have been of value to defendants in the further prosecution of the business of the store, which was a going concern, at the old stand. Everything that the plaintiff claims that defendants should have done, or should have proved, was prevented from being done or being proved by the creditors' own fault. That no man should be permitted to take advantage of his own wrong is not only a principle of the common law, but a maxim of general jurisprudence which is well recognized and established. It is based on elementary principles, and is applied both in courts of law and of equity, the reasonableness and necessity of the rule being manifest. It is of such general application that it admits of illustration from every branch of legal procedure, and is one of the basic principles which govern this case. Broom's Legal Maxims (6 Am. Ed.), p. 212, star p. 275, and cases. It applies, even though the actual wrong was unconsciously committed, which we have no doubt was the case here.

We need not discuss the point as to the retention of the lease by the defendants. The department store is well rid of it. It would have been a burden and encumbrance if it had kept it, and there is not the slightest prospect of its ever needing it. As we have said, it is a recognized principle in the law that a party cannot take any advantage from his own wrong. The creditors, by the receiver, have brought this unfortunate situation upon themselves and must abide the consequences. If they had sought the remedy in an action for the price, defendants being fully solvent, according to their own estimate of them, there would have been no ground of complaint. They have the stock of goods, and have lost

the goodwill and the lease, if of any tangible value, by their own act and by no fault of plaintiffs, who are not parties to the other action.

We have not yet understood why a tender was at all necessary, as the goods were already in the possession of the defendants. Why take them out of their possession in order to put them back again? The more clearly the facts of this case are revealed to us the more apparent it seems that the only remedy of the plaintiff—and, too, an effective one—was by a simple action to recover the price of the goods. If this had been brought there would have been no confusion, difficulty or delay, as defendants, it now appears, were willing to pay in Raleigh, though we do not think they were legally required to pay the price there. If some of the creditors wanted it paid in Raleigh, why could not the seller and buyer agree just as well, for their convenience or for any other good reason they had, that it should be paid in Baltimore? We perceive no practical difference it would make if it were paid in one place rather than the other. Proper provision it seems had been made for its distribution by a solvent concern and with adequate protection to the rights of the creditors.

Our decision upon these, the material questions in the case, renders it unnecessary to consider the remaining and very numerous exceptions. We think, though, that as the stock of goods was sold to the defendants much below cost, and by the receiver nearly three thousand dollars less than the defendants gave for it, it was some evidence of a loss in value, and even of a great depreciation.

The rulings and final decision of the court were in all respects correct. Affirmed.

J. A. HARVELL v. HAYNES AUTO COMPANY.

(Filed 5 March, 1919.)

1. Vendor and Purchaser — Contracts — Consideration — Cash Deposits — Actions.

A cash deposit, made upon a contract for the purchase of several automobiles, subject to the vendor's approval, materially altered by him, and rejected, as changed, by the purchaser, is without consideration and may be recovered by the latter in his action.

2. Evidence—Vendor and Purchaser—Principal and Agent—Declarations.

Where an agent makes a sale subject to the approval of the vendor, who makes material alterations therein, which the purchaser rejects, the declarations made by this agent in endeavoring to adjust the matter with the purchaser, under authority of his principal, are competent as evidence in the purchaser's behalf.

APPEAL by defendant from *Kerr, J.*, at August Term, 1918, of HALIFAX.

This was an action brought to recover a deposit of $250 under contract, 16 March, 1917, made by plaintiff with defendant's agent, for the purchase of ten cars, two of which were delivered and eight of which were never delivered, though demanded. The contract was signed in Weldon, but was not to be binding until accepted by the defendant in Atlanta. When the duplicate of the contract was returned from Atlanta it had been materially altered, and Harvell did not accept the contract as ordered, but demanded delivery upon the original contract. Verdict and judgment for plaintiff. Appeal by defendant.

George C. Green for plaintiff.
W. E. Daniel for defendant.

CLARK, C. J. The first issue was, "Did the defendant alter the contract of 16 March, 1917, after execution by the plaintiff and without his consent?" To which the jury responded, "Yes." The only question necessary for determination is whether there was error as to this issue, in that the court permitted the plaintiff to testify as to a conversation with Turnage, the agent with whom he made the contract, and three months after it was made, when, after a dispute had arisen, Turnage was sent to adjust the difference with the plaintiff.

The plaintiff testified that on that occasion Turnage stated to him that the "Little Haynes Junior" car, which was one of those stipulated for in the original contract, would not be furnished, and that he (the plaintiff) asked Turnage about the $250 deposit, and Turnage stated that as soon as he got to Atlanta he would have the check for the $250 sent back to plaintiff.

At the time the plaintiff made the deposit of $250 he had bought two light Haynes cars. Later he wired the defendant to hold up the shipment of the two touring cars, though he was not cancelling the contract. The evidence by him is that he did not cancel the order for the two cars named, but merely was asking that the shipment of them should be held up. There is no testimony in the record that the plaintiff ever recognized the amended contract or ever purchased any cars other than the two ordered 16 March, or that he ever ordered any cars except the Haynes Junior, all three of which were called for in the contract of 16 March.

The effect of this testimony is not to change or alter the contract, but to corroborate the plaintiff's contention that the contract had not been complied with. Turnage was acting by authority of defendant at the time, and his statements in regard to the subject of his mission were competent.

The jury having found upon competent testimony that the contract had been altered by the defendant without assent of the plaintiff, and there being no controversy that all the cars actually delivered had been paid for, the failure of the defendant to perform the contract as set out in the written agreement entitled the plaintiff to recover the $250 deposit, both because made under the contract which the defendant vitiated by the alteration, as found by the jury, and because of the failure of defendant to comply therewith. The defendant holds it without any equivalent rendered therefor, and should return it.

No error.

F. N. JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 3 January, 1919.)

Telegraphs—Commerce— Interstate Messages— Mental Anguish— Damages —Personal Injuries—Proximate Cause—Speculative Damages—Nominal Damages.

A recovery of damages for mental anguish alone may not be had on an interstate telegram announcing a death; and where a delay therein by the company has caused the sendee to miss a regular passenger train and he has obtained permission to ride on a caboose car of a freight, from which ride he has received personal injury, and also such injury from fatigue in walking from the nearest railroad station to his destination, upon the failure of being met by an automobile and his unwillingness to pay the price charged for hiring one, the failure to deliver the telegram in time is not the proximate cause of the physical injuries thus received, and they are also too speculative and remote, and nominal damages only are allowable.

APPEAL by defendant from *Ferguson, J.*, at Fall Term, 1918, of MACON.

This is an action to recover damages caused by the negligent delay in the transmission and delivery of an interstate message from Franklin, N. C., to Kingsport, Tenn., informing the plaintiff of the death of his wife. From the verdict and judgment the defendant appealed.

J. Frank Ray, T. J. Johnston, and P. B. D'Orr for plaintiff.
Merrimon, Adams & Johnston and Tillett & Guthrie for defendant.

CLARK, C. J. The complaint sets out three causes of action:

1. For mental anguish suffered by reason of the negligence of the defendant.

On the former appeal (175 N. C., 588) the Court held that this being an interstate message, recovery could not be had on that ground. The Court did not pass upon the other two grounds of action alleged.

2. There was delay in the proper transmission of the telegram, which prevented the plaintiff from leaving on the first passenger train which passed after the time at which the message should have been delivered. He secured permission to travel in the caboose of the freight train and had a rough ride, and there is evidence that he was injured by being jolted and thrown against the steel ladder in the caboose, bruising his knee and wrenching his side.

3. The third cause of action was that when the plaintiff reached Dillsboro, N. C., whence he had to travel by private conveyance to Franklin, N. C., the automobile charge was more than he was willing to pay. The conveyance which he had wired to Franklin to be sent not having arrived, the plaintiff set out to walk, and he put in evidence that he was seriously injured by the over-fatigue before the car which had been sent by his order met him.

Without going into the details of the injuries and sufferings endured by the plaintiff on the freight train and in attempting to walk from Dillsboro to Franklin, it is sufficient to say that in no sense can the delay in the delivery of the telegram be deemed a proximate cause of such injuries.

It is true that the ride on the freight train and the fatiguing walk occurred after the delay in the delivery of the telegram. If it had been delivered in proper time he might have been saved the trip by freight, though it does not appear that he would have avoided the walk, for there is no evidence that the automobile charges from Dillsboro would have been less if he had arrived by passenger train. But the syllogism *"post hoc, ergo propter hoc"* is not conclusive as to proximate cause.

The delay in the delivery of the telegram might have caused, and doubtless did cause, mental anguish to the plaintiff by preventing him from reaching home by the earliest conveyance. But that is out of this case, for the reasons given in our former opinion. But it did not cause the sufferings endured by the plaintiff in his trip on the freight train. It was his own volition that he chose that method of conveyance, which required a special application by him to the railroad authorities. He could have waited for the next passenger train. As to the physical injuries he sustained on the freight train, that is a matter for which he must look to the railroad company. The defendant could not have foreseen or contemplated that if the message was not delivered the plaintiff would seek transportation by freight, nor that he would be roughly handled on such trip. Still less could the defendant be responsible for the plaintiff undertaking to walk from Dillsboro to Franklin. He could have waited for the car which he had wired his daughter to send from Franklin, or he could have paid the price ($8 to $10) asked by the automobile owner to carry him to Franklin. There is no evidence that

the price of the automobile transportation would have been less if he had arrived on the passenger train. Still less could it have been in the contemplation of the defendant that if there was delay in the delivery of the message the defendant would set out to walk from Dillsboro, and that in doing so he would over-fatigue himself.

Both these grounds of alleged damage are too remote and speculative. It is a settled principle that the law looks to the immediate and not the remote cause of damage, the maxim being *"Causa proxima, sed non remota, spectatur."* The cause of the damage on the freight train was the negligence of the carrier either in the handling of its train or in the defective condition of its roadbed or equipment. The cause of the over-fatigue in attempting to walk out from Dillsboro was the mountainous road and the lack of physical strength in the plaintiff to endure the fatigue, and still more his own bad judgment in attempting to walk so long a distance.

These matters have been discussed recently in cases very similar to this. *Young v. Telegraph Co.,* 168 N. C., 36; *Garland v. R. R.,* 172 N. C., 638, and in *Brown v. R. R.,* 174 N. C., 694, in which the plaintiff was injured by the weather, or otherwise, in walking from the station to destination because of the delay in transportation; and *Chancey v. R. R.,* 174 N. C., 351, where the plaintiff sought to recover for robbery from his person while a passenger on a train, upon the ground that the car was overcrowded and not properly lighted. In these cases the Court held that there was not evidence of proximate cause to justify the submission of the issue of damages to the jury. The authorities and the reasoning in these cases are so full that it would be mere repetition and an affectation of learning to do more than to cite them. They are recent cases and exactly in point.

There having been negligence in the delivery of the message, the Court held, on the former appeal, that the plaintiff in any view was entitled to recover the 65 cents paid for the transmission of the message, and therefore set aside the nonsuit. We presume that this has been paid. If not, the plaintiff is entitled to judgment therefor in this action; but the court erred in refusing the defendant's prayer to instruct the jury to answer the issue: "Was the plaintiff injured by the negligence of the defendant, as alleged," in the negative.

Error.

MOLLIE E. QUEEN ET AL. v. THE DIXIE FIRE INSURANCE COMPANY.

(Filed 3 January, 1919.)

1. Insurance, Fire—Principal and Agent—Agent's Statements—Amount of Loss—Res Gestæ—Statutes—Evidence.

A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as our statute, Revisal, sec. 4755, requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon.

2. Insurance, Fire—Amount of Loss—Impeaching Evidence—Explanation—Trials—Questions for Jury.

Where property that has been allotted as a homestead has been insured against loss by fire, and suit has been instituted against the insurer to recover the loss, and the plaintiff's exceptions to the value of the property so allotted has been introduced in evidence, showing that the value was claimed to be in a less sum than that demanded in the present action, it is competent for the plaintiff to explain that it was done to gain time and pay the debt, its credibility or weight being questions for the determination of the jury.

ACTION tried before *Lane, J.,* and a jury, at May Term, 1918, of HAYWOOD.

The action was brought by the plaintiff to recover the amount of an insurance policy, or the sum of $2,150, issued by the defendant upon her dwelling-house, barn and household and kitchen furniture, and other personal property in the house. Her house was destroyed by fire in May, 1917.

The jury returned the following verdict:

1. Did the defendant, the Dixie Fire Insurance Company, execute and deliver to the plaintiffs the insurance policy, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiffs furnish to the defendant proof of loss as provided in said insurance policy after the destruction of the property by fire, as alleged in the complaint? Answer: "No."

3. If proof of loss was not furnished by the plaintiffs as required by the terms of said insurance policy, was the same waived by the defendant? Answer: "Yes."

4. What damage, if any, are the plaintiffs entitled to recover by reason of the loss of the house? Answer: "$1,800, with interest."

5. What damage, if any, are the plaintiffs entitled to recover by reason of the loss of the personal property? Answer: "$350, with interest."

6. Are the plaintiffs the owners of the personal property described in the complaint? Answer: "Yes."

Judgment was rendered on the verdict, and the defendant appealed.

Morgan & Ward and John M. Queen for plaintiffs.
F. E. Alley and Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: The first exception was taken to the declaration of Thurman Williams, agent of the defendant company, as to the value of the house, which was that it would cost her three thousand dollars to build such a house. He was then the local agent of the company, and was soliciting the insurance and preparing to issue the policy. He went to plaintiffs' home and examined the house, and while engaged in this business for the company and in the course of the transaction he stated to Mrs. Queen that it would cost three thousand dollars to build it. We do not see why this evidence was not competent.

The company contested the value placed upon the property at the trial. Mrs. Queen had testified that the house was worth at least three thousand dollars at the time it was burned. The books make a distinction between acts and declarations, or statements, which constitute part of the *res gestæ,* and those of an agent who is acting for his principal and within the scope of his agency.

Tiffany on Agency says, at p. 252: "Every act or event is set about by surrounding circumstances, or circumstantial facts, which 'may consist of declarations made at the time by participants in the act, or other acts done, of the position, condition, and appearance of inanimate objects, and of other elements which serve to illustrate the main act or event.' Subject to not very well-defined limitations, such circumstances may be proved as part of the thing done—the *res gesta,* or, as it is commonly put, the *res gestæ.* Such declarations comprise statements, exclamations and other utterances by the participants in the act. They are received on the ground of their spontaneity. 'They are the *ex tempore* utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events and are not narrative of past happenings.' Such declarations constitute an exception to the hearsay rule. To be admissible they must be made while the act is being done or the event happening, or so soon thereafter that the mind of the declarant is actively influenced by it. The cases are not in accord as to the extent of the time which the *res gestæ* cover, and indeed the time necessarily depends more or less upon the circumstances of each case." It will be seen that this refers to the admission

or declaration of a person, whether an agent or not, which was made while the transaction was going on, and in which he was a participant, for it is said that "if a declaration is admissible as a part of the *res gestæ* it is competent, no matter by whom said." Tiffany, p. 254; *Ohio, etc., Ry. Co. v. Stein,* 133 Ind., 243, per *Elliott, C. J.*

As to the statement of an agent, "It is commonly said that the statement must be made while the agent is engaged in transacting some authorized business, and must be so connected with it as to constitute part of the *res gestæ.* But 'the Latin phrase adds nothing'; it is used here as an equivalent expression for the business on hand or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent. . . . If the requirement that the statement be made as part of a pending transaction, as explained, be fulfilled the nature of the transaction is immaterial and the admission may be of a present or of a past fact. While the statement of an agent in negotiating a contract may constitute the agreement of the principal or an inducement to the contract, and thus form the basis of an action upon the contract, or for deceit, a statement made by the agent in the negotiation in regard to the subject-matter may also be used against the principal as an admission in an action not based upon the contract or the statement." Tiffany, p. 249. See, also, *Smith & Melton v. R. R. Co.,* 106 N. C., 105; *Darlington v. Telegraph Co.,* 127 N. C., 68-107.

By our statute (Revisal, sec. 4755) an insurance company cannot issue a policy upon property within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, so that it is necessary that the company, before it issues a policy, should know the true value of the property to be insured; and this agent was there for that purpose and was negotiating in behalf of his company for the insurance and preparing to issue the policy, for which purpose he was inspecting the property in order to ascertain its value, and it was while he was thus engaged for the company that he made the statement to which the objection was taken. The declaration was competent as part of the thing done within the rule we have stated. *Stanford v. Grocery Co.,* 143 N. C., 419; *Merrill v. Dudley,* 139 N. C., 57. The principle is lucidly stated and illustrated in *V. & M. R. Co. v. O'Brien,* 119 U. S., 99 (30 L. Ed., 299); *N. J. St. Co. v. Brockett,* 121 U. S., 637 (30 L. Ed., 1049), and notes.

It is immaterial to decide whether it was competent as the declaration of an agent while engaged in his principal's business and within the scope of his employment as the other is a sufficient ground for its admission.

The defendant introduced the papers containing Mrs. Queen's exceptions to the allotment of her homestead, showing that she had valued her

property at less than she now claimed, and she was then asked by her counsel why she had filed exceptions alleging a lower value, and she answered that it was done to gain time so that she could pay the debt and save her property. A witness may explain her acts, as shown by testimony offered against her, and it is for the jury to say what credit or weight should be given to the explanation. It was held in *Armfield v. R. R. Co.,* 162 N. C., 24, at 28, that when a witness is impeached by evidence of bad character or by evidence of contradictory statements made by him, confidence in his veracity and in the credibility of his testimony may be restored or strengthened by any proper evidence which tends to produce the desired effect. The very question was decided in *Phifer v. Erwin,* 100 N. C., 59, where it was held: "Where a witness, on his examination upon a second trial, gave his opinion that the value of the property in controversy was greater than the amount he had testified to on a former trial: *Held,* that he might state the reasons for the changes by way of explanation." While the explanation was not very reassuring, we cannot say it altogether lacked plausibility or force. The jury seemed to have accepted it as satisfactory, as they gave her the full amount of her policy, or what she claimed, and the verdict is not without support in the evidence. There was testimony that the agents of the company, the adjuster and another, promised that the policy would be paid.

The other exceptions, which are merely formal, are without any merit.

No error.

MAMIE V. WILLIAMS, EXECUTRIX OF MRS. S. J. DULIN, v. C. G. BAILEY ET AL.

(Filed 3 January, 1919.)

1. Wills—Production of Wills—Statutes.

A petition before the clerk of the Superior Court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is a proceeding under Revisal, sec. 3124, to compel the production of a will.

2. Same—Denial—Evidence—Clerks of Courts—Issues—Rule Discharged—Costs.

Where the respondents in proceedings to compel the production of a will (Revisal, sec. 3124) appear before the clerk at the time set for the hearing, and in writing under oath fully deny the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial

docket, and the rule against the respondents should be discharged at the petitioner's cost.

3. Same—Motions.

Where a rule issued under the provisions of Revisal, sec. 3124, in proceedings to compel the production of a will, should be discharged, a motion by the respondents to dismiss the proceedings will be treated as a motion to discharge them.

4. Appeal and Error—Wills—Production of Wills—Statutes—Fragmentary Appeals.

Where the clerk of the Superior Court erroneously refuses the respondent's motion to dismiss the proceedings to compel the production of a will (Revisal, sec. 3134), and the Superior Court judge sustains the action of the clerk, an appeal therefrom to the Supreme Court is not fragmentary, and the court will order the rule to be discharged.

CLARK, C. J., dissenting with opinion; HOKE, J., dissenting.

PROCEEDING commenced before the Clerk of the Superior Court of Buncombe County. A petition was filed by petitioner, to which the respondents answered, and petitioners filed a replication to the answer.

The clerk held that issues of fact were raised by the pleadings which should be passed on by a jury, and transferred the proceeding to civil issue docket for trial at term. The respondents excepted to said order and appealed to the judge. The appeal came on to be heard in BUNCOMBE County before his Honor, *Judge Stacy.*

Upon the hearing of the appeal the judge affirmed the order of the clerk. From the order affirming the clerk the respondents appealed to this Court.

George W. Garland, Curtis & Vernon for petitioners.
E. L. Gaither and Bourne, Parker & Morrison for respondents.

BROWN, J. Petitioner, as executor of Mrs. S. J. Dulin, filed a petition before the clerk, to which C. G. Bailey and others are made respondents, alleging that W. A. Bailey died in 1914, domiciled in Buncombe County, leaving a last will devising his estate, consisting of real and personal property, to Mrs. S. J. Dulin and others; that respondents concealed said will and have conspired to prevent the distribution of the estate as in said will provided. Petitioners pray that a citation issue requiring respondents to appear before the clerk and produce the said will, to the end that the same may be thereafter offered for probate.

The respondents appeared and answered in writing and under oath. They denied that W. A. Bailey was domiciled in Buncombe County at his death and denied specifically that they had any will of his in their possession. They averred that said Bailey left only one will that they ever knew or heard of, and that had been duly probated in common form

and again in solemn form on Davie County, North Carolina, where said Bailey was domiciled at his death, and letters testamentary issued thereon. They further aver that the original will is not in the possession or under the control of either of respondents, but is in the official custody of the Clerk of the Superior Court of Davie County.

Upon the coming in of this answer and on the return day of the citation, 4 December, 1917, no motion was made to examine respondents and no evidence was introduced by petitioner for purpose of showing that respondents concealed any will or had it in their possession.

We are of opinion that this is a proceeding under Revisal, 3124, to compel the production of a will which has never been offered for probate, and that no issues arise upon the petition and answer to be submitted to a jury.

On the return day of the citation to show cause, the respondents answered, under oath, fully, and denied the possession or control of any will of W. A. Bailey. Their answer is as full and explicit as it is possible to make it. The petitioner offered no evidence and did not ask to examine respondents. It was, therefore, the duty of the clerk to discharge the rule against respondents at cost of petitioner. On the appeal the judge should have reversed the clerk and ordered that respondents be discharged. It is true the motion was to dismiss the proceeding when technically it should have been to discharge the respondents, but we treat it as the latter. The record shows that while the clerk decided to transfer the cause to the civil issue docket as upon issues of fact raised, the respondents appealed to the judge from such order, and it was from the judgment of the judge upon that appeal the respondents appealed to this Court.

It is conceded that an appeal from a refusal to grant a motion to dismiss an action does not generally lie. It is the duty of the party to note his exception and proceed to trial before the judge and jury. But this is neither a civil action or special proceeding. It is a proceeding under the statute to discover a secreted will in order that it may be probated, and no issues of fact were raised triable by a jury. When these respondents answered under oath, denying possession or knowledge of any such will except the one in the clerk's office in Davie, they were entitled to their discharge, as petitioners offered no evidence whatever to contradict them, and did not even ask to examine them. It is so ordered.

Reversed.

CLARK, C. J., dissenting: As stated in the case settled on appeal, agreed to by both parties, this was a special proceeding begun before the clerk in Buncombe and transferred by him to the civil issue docket for trial. The appeal being heard before *Stacy, J.*, the defendants moved to

dismiss. His Honor refused to dismiss and directed that the cause be retained on the civil issue docket for trial. The defendants appealed.

If there is one proposition of law which has always been held by us, without a single exception, it is that "no appeal lies from a refusal to dismiss." In such case there is no judgment, but simply the refusal of a judgment, and the defendant should note his exception and appeal from the verdict and judgment upon the merits. This has been held in *Smith v. Mitchell,* 63 N. C., 620; *Garrett v. Trotter,* 65 N. C., 435; *Mastin v. Marlowe,* 65 N. C., 696; *Mitchell v. Kilburn,* 74 N. C., 483; *Perry v. Whitaker,* 77 N.C., 102; *Foster v. Penry, ib.,* 160; *Crawley v. Woodfin,* 78 N.C., 4; *McBryde v. Patterson,* 78 N.C., 412; *Capell v. Peebles,* 80 N.C., 90; *Long v. Bank,* 81 N. C., 41; *Gay v. Brookshire,* 82 N. C., 409; *R. R. v. Richardson, ib.,* 343; *Wilson v. Lineberger, ib.,* 412; *Spaugh v. Boner,* 85 N. C., 208; *Allen v. Royster,* 107 N. C., 278; *Plemmons v. Improvement Co.,* 108 N. C., 614; *Guilford v. Georgia,* 109 N. C., 310; *Lambe v. Love, ib.,* 305; *Sheldon v. Kivett,* 110 N. C., 408; *Cameron v. Bennett, ib.,* 277; *Mullen v. Canal Co.,* 112 N. C., 109; *Luttrell v. Martin,* 111 N. C., 528; *Lowe v. Accident Assn.,* 115 N. C., 18; *Farris v. R. R., ib.,* 600; *Sprague v. Bond,* 111 N. C., 425; *Joyner v. Roberts,* 112 N. C., 111; *Burrell v. Hughes,* 116 N. C., 430; *Whitaker v. Dunn,* 122 N. C., 103; *Fertilizer Co. v. Marshburn, ib.,* 411; *Cooper v. Wyman, ib.,* 784; *Jones v. R. R.,* 127 N. C., 188; *Clinard v. White,* 129 N. C., 250; *Jester v. Steam Packet Co.,* 131 N. C., 54; *Meekins v. R. R., ib.,* 1; *Johnson v. Reformers,* 135 N. C., 387; *Kerr v. Hicks,* 154 N. C., 269; *Trustees v. Hinton,* 156 N. C., 586; *Beck v. Bank,* 157 N. C., 105; *Chadwick v. R. R.,* 161 N. C., 209; *Bradshaw v. Bank,* 172 N. C., 633, and cases there cited.

Besides the above cases, there are numerous others which we have not cited, but all are to the same purport, that an appeal does not lie from a refusal to dismiss. There are also many cases in which this uniform ruling has been adopted by dismissing the appeal without repeating the reasons. These reasons are:

1. That it does not come within the instances in which an appeal is permitted by Revisal, 587. See cases cited thereunder in 2 Pell's Revisal, on page 313.

2. Another reason is that no appeal lies, because if it did a defendant could always procure from six to twelve months delay in any case by moving to dismiss and appealing from such refusal. It is, therefore, an important matter to observe the statute and our uniform decisions.

Revisal, 346, provides that all remedies under our present system are either actions or special proceedings. In this instance the case agreed on appeal states that this was a special proceeding, and when the case was transferred to the judge he was seized of full jurisdiction (Revisal,

614) and could have remanded the cause to the clerk, or if there were issues raised, as he decided, submit them to a jury. Having so decided, the judge could not dismiss the action.

In *Goode v. Rogers,* 126 N. C., 62, which is a case exactly in point, it being an appeal from the clerk in special proceeding, the court below held that there were issues of fact for the jury and directed the cause to be placed on the civil issue docket for trial. The petitioners in this Court contended that only *questions* of fact were raised, and should have been decided by the court, and appealed from the order directing a jury trial. This Court held that it could not consider the matter for the reason that the issues formulated by the judge have not been tried below, and dismissed the appeal as premature.

It is very clear that this appeal was premature and should be dismissed. The defendants should have excepted to the order, and on the trial of the issues, if the verdict shall be against them, then the appeal would bring up the exceptions to the submission of the issues.

In *Beck v. Bank,* 157 N. C., 105, *Allen, J.,* approved the following from *Hoke, J.,* in *Pritchard v. Spring Co.,* 151 N. C., 249: "If a departure from this proceeding is allowed in one case it could be insisted upon in another, and each claimant conceiving himself aggrieved could bring the case here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemly and proper disposal of causes prevented." The appeal in that case was dismissed with the right to the party to enter the exception, which could be considered upon appeal from the final judgment, which accordingly was done when the case came up. *Beck v. Bank,* 161 N. C., 205.

This appeal should be dismissed under our uniform decisions not only because not allowed by the statute, but because as a matter of fact the complaint and answer bristle with issues of fact raised by the pleadings. The first paragraph of the petition alleges that W. A. Bailey died domiciled exclusively in Buncombe County. This is denied by the answer, which alleges that he died domiciled in Davie County.

Paragraph 2 recites the next of kin and heirs at law, which is denied by the answer.

Paragraph 3 of the complaint, or petition, asserts that the defendant left a will, duly executed, which immediately after his death came into the possession of the defendants, and by said will the deceased disposed of $250,000 of property, and the complaint specifies certain legacies in said will amounting to $80,000, and avers that the defendants have secreted, suppressed and concealed said last will to hinder and prevent the distribution of the estate as provided therein. The answer explicitly denies this and sets up that the deceased left a will of a different tenor which has been duly probated in Davie County, which it is alleged was

his domicile, and the defendants deny that they have had knowledge of any other will.

Paragraph 4 alleges that the deceased bequeathed his sister, Mrs. Mary Caton, $50,000, with sundry allegations of fraud and duress to prevent her taking action to set up said will. This is denied at length in the answer.

Paragraph 5 alleges that W. A. Bailey, at the time of his death and for years prior thereto, had been domiciled exclusively in Buncombe County, which had exclusive jurisdiction of administration upon his estate. The answer makes a full denial of this, reciting numerous statements of fact, and avers that he was domiciled in Davie County.

Paragraph 6 avers that the defendants are unlawfully collecting and converting to their own use funds of the estate which, under the later will, have been devised to the plaintiffs. This also is denied by the answer.

Paragraph 7 avers that one of the petitioners, Mrs. Williams, has qualified as the executor of one of the devisees under the will. This the answer denies and further avers that the plaintiffs are not heirs or devisees or legatees of the estate of W. A. Bailey, and that his true will has been probated in Davie County, which was his domicile.

The issues of fact and of law raised by the pleadings have not been passed upon by the judge, and it would be a grave injustice to the plaintiffs for this Court to sustain the motion to dismiss, which would be a finding here that the allegations of fact and of law in the complaint are untrue. There can be no question that the court below had jurisdiction if the facts are as alleged in the petition. Whether they were true or not was a matter for the jury, as his Honor held.

Aside from the other issues of fact, it seems that the defendants have probated a will of W. A. Bailey in Davie County, alleging that his domicile was there, and that the paper-writing probated by them was his last will and testament. The plaintiffs allege that the exclusive domicile of the deceased was in Buncombe County, and that he left a later will, duly executed, devising his property, estimated at a quarter of a million dollars, differently in many respects from the will probated in Davie, and the complaint further avers that the latter will was wrongfully probated in Davie, and that the defendants had possession of the later will, which they have concealed or suppressed, and the plaintiffs seek in this proceeding to set up the lost will and probate the same, if the original cannot be produced, alleging that the defendants have possession of the same and are fraudulently converting the assets of the estate from the true object of the bounty of the deceased as specified in such later will.

This is a serious proceeding, containing most serious charges, and calling for the decision of the issues of fact by a jury and of the inci-

dental matters of law by the judge. The plaintiffs should not be cut off from a hearing of the matters set out in their petition by a motion to dismiss; nor does the appeal lie upon the refusal of such motion, but upon exception entered an appeal will lie from the final judgment. The issues of fact should be found, and if in favor of the defendants they will not need to appeal.

There have been some cases of appeal from a refusal to dismiss which were simple in their nature, and the court has in such instances, while dismissing the appeal as improvidently taken, expressed its opinion upon the proposition of law involved (*S. v. Wylde,* 110 N. C., 503). But that is a matter of discretion, and besides it is impracticable in a case like this, involving most serious issues of fact as to the domicile of the deceased, the allegation of the false probate of an earlier will in the wrong county and the suppression of a later will by the parties to such alleged fraudulent probate, and the fraudulent conversion to their own use of the legacies and property devised and bequeathed to the plaintiffs under the later will. These are allegations to be decided by the judge and jury.

The case should be remanded, to be proceeded with according to the statute and uniform decisions of this Court, and reserving the exception to the refusal to dismiss, if the defendants so desire, with an appeal from the final decision of the case below upon the merits.

On the motion to dismiss, the allegations of the complaint must be taken as true; and these are that the deceased was domiciled exclusively in Buncombe and left the latest will, which the plaintiffs are entitled to have probated, and that it has been suppressed and is in possession of the defendants, who have probated an earlier will in the wrong county and have taken possession and are converting to their own use the assets of the estate. On these facts the court has jurisdiction, and the issues of fact raised should be determined.

Under our statute, Revisal, 346, there *can* be no other procedure than an action or a special proceeding. There can be a motion in the cause in either of these, but this is certainly not such motion. It began by summons as an independent action. Revisal, 3124. When the judge formulated the issues to be submitted to the jury, of course the plaintiffs did not and could not offer evidence to his Honor, but as their allegations must be taken as true upon a motion to dismiss, they are ready to offer such evidence before the jury, and should not be cut off from doing this by this premature appeal. The plaintiffs are not restricted to an order to compel the production of the alleged will, but in this proceeding are entitled to try all the issues raised. Even if the prayer for relief had been restricted to requesting an order for the production of the will, nothing is better settled than that the plaintiff is not restricted to the prayer for relief, but is entitled to any remedy which his

allegations and proof entitle him to receive, and that an informality or defect in the demand for judgment is immaterial and cannot be ground for a demurrer or other objection; and indeed that the failure to pray for any relief is not material. "The facts stated and proven, and not the prayer for relief, show what remedy ought to be granted." *Johnson v. Loftin,* 111 N. C., 319; *Adams v. Hayes,* 120 N. C., 383; *Davis v. Ely,* 100 N. C., 283; *Simmons v. Allison,* 118 N. C., 763; *Sams v. Price,* 119 N. C., 572; *Parker v. R. R., ib.,* 677; *Gilliam v. Ins. Co.,* 121 N. C., 369, and many other cases cited; Clark's Code (3d Ed.), sec. 233 (3), and numerous cases since, all to the same purport.

GUILFORD LUMBER MANUFACTURING COMPANY ET AL. *v.* C. G. JOHNSON, CONTRACTOR, AMERICAN SURETY COMPANY, ET AL.

(Filed 3 January, 1919.)

1. Principal and Surety — Contracts — Bonds — Materialmen — Laborers— Parties.

Laborers or materialmen may recover from the surety on a bond given by the contractor for the performance of his contract to erect a building, etc., when by express provision this liability is covered by the terms of the bond, or when it appears by fair and reasonable intendment therefrom that these rights were provided for and therein contemplated.

2. Same—Premium—Consideration.

Where it appears that the attorney for the owner of a building to be erected required of the duly authorized agent of the surety that the bond provide for the payment of laborers and materialmen, for which provision an extra premium had been demanded and received, and the relative terms expressed in the bond were that it should be liable for payment of labor and material provided for in the contract: *Held,* the laborers on and the furnishers of material used in the building have a right of action against the surety on the bond, and may recover the amounts of their respective claims, proportionate to whatever amount, if anything, is in the hands of the owner for distribution among such claimants under the provision of the lien laws.

3. Principal and Surety—Contracts—Bonds—Breach—Limitation of Actions.

A surety bond given by the contractor to the owner of a building to be erected, providing for the payment of laborers and men furnishing material for the building, provided, among other things, that no suit, action or proceeding, by reason of any default, shall be brought against the principal or surety, or shall recovery be had for damages accruing after a certain future date: *Held,* the restrictive stipulations refer to suits seeking to recover damages which might accrue after the time stated, and do not affect the subsequent maintenance of an action to recover damages having theretofore accrued.

4. Same—Insurance—Statutes.

Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract are regarded in the nature of contracts of insurance coming under the provisions of Revisal, ch. 100, sec. 4805; and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Revisal, sec. 4809.

5. Same—Public Policy—Stipulations.

Revisal, secs. 4805, fixing a limitation of time in which actions shall be brought on a contract of indemnity or surety bond for the performance of a builder's contract indemnifying the owner, the laborer, and materialmen against loss arising from its breach is in furtherance of the public policy of this State and valid; and this position is not affected by a clause in the contract that it shall be only considered as one of suretyship.

6. Principal and Surety—Contracts—Bonds—Stipulations—Notice—Waiver—Principal and Agent.

The surety on a builder's contract stipulating that upon the contractor's breach, written notice thereof with a verified statement of the particular facts showing such default and the date thereof shall, within thirty days after such default, be delivered to the surety at its office, etc., may waive the giving of such notice by his duly authorized agent acting within the scope of his agency or under special authority conferred, or by the surety knowingly accepting benefits thereunder.

7. Same—Benefits Retained.

Where there is evidence tending to show that the owner, acting through his attorney, had refused to accept a surety bond for a building contract without provision for indemnity to the laborers or materialmen, and thereafter the surety company, by its duly appointed and qualified resident assistant secretary, had issued the bond required, in consideration of the payment of a premium in double the amount theretofore charged, upon condition that checks in payment for material should be drawn jointly by the said resident secretary and the contractor, and that the surety company had several active vice-presidents, who were good business men, in the locality, and that the notice of the contractor's default required by the contract had not been given to the surety company within the time specified, but that action was delayed by the earnest solicitation of the resident secretary that the contractor be permitted to complete the contract: *Held*, sufficient of the direct or implied authority of the agent of the surety company to waive the giving of the notice, and also of a waiver by the company by accepting and retaining the benefits thereof, and there being no restriction of the agent's authority in the written instrument, or that the surety company had been damaged by the delay.

8. Principal and Agent—Acts—Declarations—Evidence.

Evidence of the agency is competent when the acts done by the agent in the course of his employment are so open and continued and of such character as to infer authority actually possessed by him, though, as a general rule, such agency may not usually be shown by the acts or declarations of the agent.

ACTION heard on exceptions to report of referee, before *Adams, J.*, at June Term, 1918, of GUILFORD.

It appeared from the facts in evidence and findings of the referee that in February, 1916, the Greensboro Warehouse and Storage Company, the owner, contracted with defendant C. G. Johnson to supply the material and construct six houses for the company, in or near the city of Greensboro, on a designated site and according to certain plans and specifications for the price of $19,900, the same to be completed by 15th June, 1916, and in case of failure to deliver the completed buildings at that time to pay the owner $1.50 a day rental of each uncompleted house until delivery of the entire work included in the contract; that said contractor gave bond in the sum of $10,000, executed by the surety company, guaranteeing the faithful performance of the contract, stipulating, among other things, that the bond should be liable for payment of labor and material provided for in the contract, and containing other stipulations and conditions hereinafter referred to; that some time in September, 1916, the contractor having failed to complete the work and being unable to carry it to completion, the owners gave written notice to the contractor and the company, took over the work, and, under a provision of the contract to that effect, completed the buildings, leaving $968.65 of the contract price unused in the work; that various claimants for material furnished the contractor while the work was going on, and unpaid for, sued the parties defendant for their damages, each filing verified complaints, and said suits were consolidated by order of court and conducted as an action in the nature of a creditor's bill in the name of the Guilford Lumber Co. et al. against the three named defendants.

The surety company answered, denying liability on each and all of the claims, setting forth certain defenses arising under stipulations of the contract, and in due course the cause was referred to T. C. Hoyle, Esq., of the Greensboro Bar, to hear and pass upon all claims presented on or before 12 March, 1917, and make report thereon, subject to exceptions; that the referee proceeded according to the order, heard evidence and argument, and made report with pertinent and adequate findings of fact and conclusions of law, and holding the surety liable to plaintiffs for the amounts due plaintiffs for materials furnished, etc.

On the hearing in the Superior Court all exceptions filed by the defendant company were overruled, the report confirmed, and judgment entered against the contractor and on the bond for the amount of the claims, subject to a *pro rata* credit of $968.65, the amount saved of the contract price in the completion of the work, this being in accord with a provision of the agreement. Defendant, the surety company, excepted and appealed.

Brooks, Sapp & Kelly, Justice & Broadhurst, Wilson & Frazier, Clifford Frazier, and C. L. Shuping for plaintiffs.

W. P. Bynum and R. C. Strudwick for defendants.

HOKE, J. It is the well-established principle in this jurisdiction that the beneficiaries may recover on a bond of this character—usually laborers and materialmen—when there is express provision to that effect, or when it appears by fair and reasonable intendment that these rights and interests were contemplated and being provided for. *McCausland v. Construction Co.,* 172 N. C., 708-711, citing *Morton v. Water Co.,* 168 N. C., 582; *Withers v. Poe,* 167 N. C., 372; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Town of Gastonia v. Engineering Co.,* 131 N. C., 363; *Gorrell v. Water Co.,* 124 N. C., 328.

From the findings of the referee and a perusal of the bond and contract it appears that "this bond is to be liable for payment of labor and material"; and not only so, but when the bond was first presented to the attorney of the owner, objection was made that it contained no such guarantee, and the agent and assistant resident secretary of the company, O. L. Grubbs, on being asked if his company didn't make that kind of a guarantee, replied that it did, but at a higher premium.

Speaking to this question, the attorney testified as follows: "I asked him whether that bond protected claims for labor and material which were against the contractor, but which might not be legal claims against the owner. He told me that it did not. I told him that I would very much prefer for the bond to be so written that it would cover all claims against the contractor for material or labor, no matter whether the owner was legally responsible or not, and asked him if he wrote such a bond; that I understood other companies did, and that it was generally known as a government bond. Mr. Grubbs told me that they wrote such a bond, but that the form I wanted took twice the premium of the original contractor's bond, and that in his opinion Mr. Johnson would object to paying the double premium. I told Mr. Grubbs that under the circumstances I would agree to pay the extra premium myself and asked him if he would write it under these conditions. He told me that he would write that sort of a bond, but that if he wrote that bond he would like to have joint control of the funds with Mr. Johnson, and I told him that would suit me even better. We had a meeting, and there were present at the meeting Mr. Johnson, Mr. Hughes, Mr. Brown, Mr. Grubbs, and myself. I made the statement at the meeting that I wanted a bond which would not only indemnify the owner, but would indemnify the labor and materialmen, and that I understood it was a double premium; that we would pay the premium and wanted joint control of the funds. I asked Mr. Grubbs whether he would send the bond to his company to get it executed, and he told me that he would not, that he could write the bond himself and would file with the bond authority from the company for making contracts in their name."

This testimony and the authorities cited are in full support of the

referee's findings and conclusions of law thereon, that the bond may be made directly liable to the claimants, and defendant's exceptions to these rulings must be disallowed.

Again, the bond stipulates, among other things, that no suit, action or proceeding, by reason of any default, shall be brought against the principal or surety, or shall recovery be had for any damages accruing after 15 September, 1916; that service of any writ or process commencing any such suit, action or proceedings shall not be made after that date, etc., and it is objected that this suit, instituted after that date, in October, 1916, and the early part of 1917, cannot be maintained.

We concur in the view of the referee, approved by his Honor, that the restrictive stipulations, by correct interpretation, refers to suits seeking to recover damages which might accrue after 15 September, 1916, and that it does not prevent the maintenance of an action brought after that date for damages accruing prior to that time. Apart from this, guarantee or indemnity bonds of this character are regarded in this jurisdiction and under well-considered authority elsewhere as being in the nature of insurance contracts and, for like reasons, subject to similar rules of interpretation. *Bank v. Fidelity Co.,* 126 N. C., 320; *American Surety Co. v. Pauley,* 170 U. S., 133-160; *School District v. McCorley et al.,* 92 Kan., 53; 1 Cooley Briefs on Insurance, pp. 590-592. They are, too, classed and regulated under our General Insurance Laws, ch. 100; Revisal, sub. div. 14, sec. 4805, and in our opinion comes clearly within the terms and purpose of section 4809 of the statute which makes provision as follows: "No company or order, domestic or foreign, authorized to do business in this State under this chapter, shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor shall it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff shall take a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section shall be void."

There is nothing in this section which imposes undue restriction on the right of contract guaranteed the citizen by our Constitution, and being, as it is, an expression and in furtherance of the public policy of the State on this subject, all contracts covered by the law must be and are made subject to its provisions, and the position is in no way modified or affected by the stipulation appearing in this agreement "That the obligations of the surety hereunder is and shall be construed strictly as one of suretyship only," etc. *Smathers v. Ins. Co.,* 151 N. C., 98; *Branch v. Tomlinson,* 77 N. C., 388; *Short v. Bullion, etc., Mining Co.,* 20 Utah, 20; 9 Cyc., 480.

In this last citation, the principle is stated as follows: "A person may lawfully waive by agreement the benefit of a statutory provision. But there is an important exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where the rights of third parties, which the statute was intended to protect, are involved."

After stipulating for the faithful performance of the contract and for the payment of labor and materials, the bond contains, among others, the following provision: *"Provided, however,* and upon the following further express conditions: (1) That in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of said contract, written notice thereof, with a verified statement of the particular facts showing such default and the date thereof, shall, within thirty days after such default, be delivered to the surety at its office in the city of Washington, D. C., and that in case of any such default all moneys which, but for such default, would be due or would thereafter become due to the principal shall be held by the obligee and by him applied for the indemnification of the surety."

And recovery is resisted further on the ground that default was made in not completing the building by 15th June, and the written notice referred to and required by this provision was not given till some time in September following.

Where a clause of this kind is expressed in the general terms of this stipulation, there is much authority to the effect that a failure to give the notice provided for does not always or necessarily extend to the full measure of the obligation, but is restricted to those defaults for which damages are claimed; for instance, that a default in failing to complete the contract on time is not within the terms and meaning of the clause unless the recovery is sought for such failure; and it is further held that such a stipulation does not apply to suits and claims for labor and material, a position that finds support in the closing part of the provision: "That on default made, the owner shall retain any amounts due or would have been due in protection of the surety," and by a clause in the builder's contract making express provision for the damages to be paid in case of delay, to wit, "a rental of $1.50 per day for each uncompleted house till the entire delivery of the work," etc. *Lakeside Land Co. v. Empire, etc., Surety Co.,* 105 Minn., 213; *Kildall Fish Co. v. Giguerre et al.,* 136 Minn., 401; *Monroe v. National Surety Co.,* 47 Wash., 488; *Denney v. Spurr et al.,* 38 Wash., 347; *American Surety Co. v. Scott,* 18 Okla., 264; *School District v. McCurley et al.,* 92 Kan., 53.

But assuming that in all actions of this kind, prosecuted directly on the bond by the materialmen, they must be bound by its stipulations,

we fully concur in the ruling also that this requirement of the contract has been waived and the company is not in a position to maintain such a defense. On this question it appears from the facts in evidence and the findings of the referee that the bond when first presented to the attorneys of the owner contained in express terms no provision for the payment of laborers and materialmen, and the agent of the company in charge of the matter changed the bond so as to make the same liable in this respect, receiving for the company an additional fee by reason of this increase of liability; that the certificate of authority filed with the owner by the agent showed that he was a duly elected and qualified resident assistant secretary of the company, and that while there was a number of resident assistant vice-presidents of the company in Greensboro having power to affix the seal of the company to obligations of this kind they were not to be considered as binding unless attested by this resident secretary.

It further appeared that when this officer inserted in the bond the required stipulation, guaranteeing payment to the materialmen, in further protection of his company and with the assent of all the parties, he secured a change in the building contract to the effect that any and all checks in payment for material should be drawn jointly by said agent and the contractor, and they were so drawn during the continuance of the contract relations, the agent, with said contractor, receiving in the months of March, April, May, June, and July sums amounting to $16,615, which was paid to claimants in the reduction of the actual or potential liability of the company; and, further, that the delay in taking over and completing the work by the owner, under a clause providing for this course, and in giving the notice stipulated for in the bond, was owing to the request and earnest insistence of the company's agent, both to the owner and the materialmen, he representing that the contractor had arranged to secure the necessary money and would complete the buildings if allowed the additional time. It was shown that there was a number of resident vice-presidents of the company living in the city of Greensboro at the time, and it also appears, by reasonable inference, that while the contract was thus in the course of performance a representative of the company from the central office was in Greensboro for the purpose of looking into the matter and with every opportunity to do so. There is nothing in the evidence, written or oral, that puts any express restrictions on the agent's authority in the respect suggested; nor does it appear that the defendant company has in any way been damaged by reason of the delay, and under the conditions presented and the authorities applicable, we are of opinion that this agent and resident assistant secretary was a "general local agent" having full charge of the matter; that his acts in the premises were binding on

the company and constituted a waiver of the alleged breach, if indeed any breach was committed. *Horton v. Insurance Co.,* 122 N. C., 498; *Dibbrell v. The Home Insurance Co.,* 110 N. C., 194; *Grubbs v. Insurance Co.,* 108 N. C., 472; *Union Life Insurance Co. v. Williams,* 80 U. S., 222; 14 R. C. L., 1158; 3 Cooley Insurance Briefs, 2481; Vance on Insurance, 307. And if it be conceded that the acts of Mr. Grubbs, the assistant secretary, were beyond the powers ordinarily exercised by agents of this character, we think the facts in evidence permit and fully justify the inference that in this instance he was acting by authority properly conferred.

It is true, as a general rule, that where an agent has done an act beyond the scope of his agency, neither his declarations nor his acts, nor the act itself, can be received as evidence of the existence or extent of his powers. See the well-considerd case of *Daniel v. R. R.,* 136 N. C., 517. But it is also recognized that under some conditions the acts of an agent, in the course of his employment, may be so open and continued and of such a character as to afford evidence of the authority actually possessed by him. This is very well illustrated in the recent case of *Powell v. Lumber Co.,* 168 N. C., 632. In that case a company, engaged in constructing a building of considerable proportions in the city of Raleigh, was sued by claimants for material supplied for the building on the orders of the company's agent in charge of the work. It was contended for the company that this agent was only a "foreman on the job," and that the orders were entirely beyond the scope of his authority, real or apparent. It appeared, however, that these orders of the agent, large in amount, extending over a good period of time and for material openly purchased and used in the course of the agent's work, were competent on the issue and sufficient to uphold the conclusion that the agent had actual authority to make the contract sued on. Speaking to the question in that case, the Court said: "While it is true, as held in *Daniel v. Coast Line,* 136 N. C., 517, and *Francis v. Edwards,* 77 N. C., 271, and other well-considered cases, that neither the existence nor the extent of an agency may be shown by either the declarations or acts of an agent, and by them alone, it is also established that the acts of an agent, in the course of his employment and indicative of authority, may be of such character and circumstance or so often repeated as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal, and in this way may of themselves become relevant on the question of authority expressly conferred. *Newbury v. R. R.,* 167 N. C., 50; *R. R. v. Dickenson,* 78 Ark., 783; *Lytle v. Bank,* 121 Ala., 215; *Harvester Co. v. Campbell,* 43 Tex. Civ. App., 421; *Doan v. Duncan,* 17 Ill., 272; 31 Cyc., 1662. In this last citation, the principle is thus stated: 'As a general rule, the fact of agency cannot be

established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.' "

The facts in evidence, as accepted by the referee and the court below, showing, as stated, an open and continuous exercise of the power claimed on the part of the agent during the entire life of the contract, with eight resident vice-presidents of the company living in the city, all capable and alert attorneys and good business men, and with a special representative of the company coming to look over the matter, at least once, while the contract was in the course of performance, would in any event bring the present case within the principles of the above decision and others of like purport and justify the conclusion that the agent, in this instance, acted by authority duly conferred; that the delay complained of was at his request, and the company having authorized and received the benefits of his action is not in a position to rely or insist upon such delay as a defense.

We find no error in the proceedings, and the judgment below must be Affirmed.

S. R. FELMET ET AL. v. THE TOWN OF CANTON.

(Filed 3 January, 1919.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Improvements—Assessments.

Municipal corporations, acting under authority conferred by statute, may make assessments upon the land abutting upon the street for public local purposes, according to any of the recognized methods of procedure and apportionment, including both the front-foot rule as well as the creation of local assessment districts.

2. Same—Statutes—Taxation—Discretionary Powers—Courts.

The authority conferred by statute on municipal corporations to assess lands abutting upon the streets for public local purposes comes within the power of taxation and is largely a matter of legislative discretion, usually held to be conclusive as to the necessity of the improvement, and in respect to the apportionment and the amount only becomes a judicial question in cases of palpable and gross abuse.

3. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Assessments—Notice—Objection—Estoppel.

Where the notice provided by the statute has been given the owners of land abutting on a street of assessments to be made on their property for

street improvements, and an opportunity to be heard thereon is afforded them before the designated authorities, and no objection is made as to the amount, the owner is usually estopped from questioning the validity of the assessment when determined upon by the method prescribed.

4. Municipal Corporations — Cities and Towns — Streets and Sidewalks—Water Pipes—Assessments—Front-Foot Rule—Statutes—Tax Districts.

Where the commissioners of a town, acting in pursuance of a statute, have laid pipe lines along certain designated streets, in extension of the water system, and assessed the costs one-third each against the abutting owners on either side of the streets, and apportioned such costs in an assessment according to the front-foot rule, and have given proper notice of such assessment required by the statute, and no objection was made by any of the property owners, and it does not appear that there is anything unjust or oppressive, either in the improvements itself or the method or amount of the assessment, the statute having provided for the method of assessment by the front-foot rule: *Held*, objection that a taxing district should have been formed is untenable, and a temporary restraining order theretofore issued was properly dissolved.

5. Municipal Corporations—Cities and Towns—Profits—Governmental Functions—Water Pipes—Assessments.

The principle upon which a municipality engaged in supplying water to the individual citizen, under contract for profit or pay, must be considered and dealt with as a private owner, applies to the ordinary burdens and liabilities incident to their private business relations, and not to its work for the public generally, such as procuring its water supply and extending it, providing for fire protection and sanitation purposes, and the like, for therein the municipality is to be regarded as a governmental agency and, as such, possessing and capable of exercising the powers and privileges conferred upon it by law.

6. Statutes — Municipal Corporations — Cities and Towns — Water Pipes—Assessments—Notice.

Construing sec. 6, ch. 12, Private Laws of 1917, with other relevant sections of the act, especially sections 4 and 5, it is *Held*, that the provision for notice of assessment to be given by the town of Canton is not confined to the improvement of its streets alone, but includes the laying, etc., of its water pipes.

ACTION heard on return to a preliminary restraining order before *Lane, J.*, at May Term, 1918, of HAYWOOD.

The action was instituted by plaintiffs, citizens and abutting owners of property in West Canton, to set aside and restrain the collection of an assessment made by the town of Canton against plaintiffs as abutting owners by reason of a pipe laid along the streets in front of plaintiffs' property and for the purpose of supplying the owners and occupants with the city water, etc. On the hearing the restraining order was dissolved and plaintiffs excepted and appealed.

J. Bat Smathers and Thomas A. Clark for plaintiffs.

J. T. Horney and Thomas A. Jones for defendants.

HOKE, J. The right of municipalities to make these assessments for public local purposes, when acting under legislative authority properly conferred, has been very broadly upheld in this State, extending to any of the recognized methods of procedure and apportionment and including both the front-foot rule as well as the creation of local assessment districts. Being, as it is, referred to the power of taxation, it is very largely a matter of legislative discretion, usually held to be conclusive as to the necessity for the improvement, and in respect to the method of apportionment as well as the amount it only becomes a judicial question in cases of palpable and gross abuse. *Justice v. Asheville,* 161 N. C., 62; *Tarboro v. Staton,* 156 N. C., 504; *Schank v. Asheville,* 154 N. C., 40; *Kinston v. Wooten,* 150 N. C., 295; *Kinston v. Loftin,* 149 N. C., 255; *Asheville v. Trust Co.,* 143 N. C., 360; *Durham v. Riggsbee,* 141 N. C., 128; *Hilliard v. Asheville,* 118 N. C., 845; *Raleigh v. Peace,* 110 N. C., 32; *Honck v. Drainage District,* 239 U. S., 254; *French v. Barber, etc., Co.,* 181 U. S., 324.

In *Tarboro v. Staton, supra,* the recognized principle is stated as follows: "While these assessments are upheld on the theory of special benefits conferred, and which bear some reasonable relation to the burdens imposed, authority to make them is referred to the sovereign power of taxation, which is primarily and as a rule exclusively a legislative power; and where the Legislature, or a municipal government, exercising legislative power expressly conferred for the purpose, has provided for a local improvement of this character, its action is conclusive as to the necessity for the improvement; and in establishing general rules by any of the recognized methods imposing special assessments for its construction and maintenance and in applying these rules or methods to the property of an individual owner, the courts are permitted to interfere only in rare and extreme cases, in which it is clearly manifest that the principle of equality has been entirely ignored and gross injustice done."

And in *Raleigh v. Peace:* "The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for or the manner of making such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle."

And in respect to the notice in these cases, our decisions are to the effect that it is not required that notice be given the owner of the resolutions to condemn his property, nor of its actual appropriation, but the constitutional guarantees for the owner's protection are met when such a notice is provided for or actually given that will enable him to appear

before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge upon his property. *Kinston v. Loftin, supra,* citing *Davidson v. New Orleans,* 96 U. S., 97; *Durham v. Riggsbee, supra,* and *S. v. Jones,* 139 N. C., 613.

In this connection, it has been held that if the statute so provides, public notice in a newspaper of general circulation in the vicinity will suffice. *Luther v. Comrs.,* 164 N. C., 241; *S. v. Jones,* 139 N. C., *supra; Wright v. Davidson, supra; Lent v. Tillson,* 140 U. S., 316; 15 Cyc., 847. And when the notice required by the statute has been duly given, affording opportunity to appear and be heard on the question, if no objection is made, the owner is usually estopped from questioning the validity of the assessment. *Luther v. Comrs., supra; Schank v. Asheville, supra;* 10 R. C. L. 230, etc.

From the facts in evidence, it appears that, pursuant to powers conferred by express legislative enactment (Private Laws 1917, ch. 12), the commissioners of the town of Canton, in extension of their water system, have laid these pipe lines along certain designated streets of West Canton and assessed the costs, one-third each, against the abutting owners on either side of the streets and apportioned according to the front-foot rule; that proper notice of such assessment was given as the statute requires, and no objection was made by the property owners, or any of them; in fact, the improvement seems to have been undertaken at the instance of a majority of the property owners in the vicinity. It nowhere appears that there is anything unjust or oppressive, either in the improvement itself or the method or amount of the assessment, and under the authorities cited and the principles prevailing in this jurisdiction his Honor correctly ruled that the restraining order be dissolved.

It is chiefly objected for plaintiff that the apportionment by the front-foot rule is not permissible in case of laying these pipe lines for the purpose of extending public water systems, but that a taxing district should have been formed. But the statute applicable makes express provision to the contrary. The method by the front-foot rule, as a general proposition, has been repeatedly approved in our decisions. It is not shown that it would operate either unequally or harshly in the present instance, and the great weight of authority bearing directly on the question is against the position. *Parsons v. District of Columbia,* 170 U. S., 45; *Hewes v. Glass,* 170 Ill., 437; *Hughes v. Mence,* 163 Ill., 535; *Phil. v. Union Burying Ground,* 178 Pa. St., 533; 1 Farnham on Water and Water Rights, 745; 4 McQuillan on Municipal Corporations, sec. 1796.

It is further argued that as the town is authorized to sell water to individuals, the water system has taken on the character of a private enterprise and the power of local assessment should no longer be allowed

to it. True, in *Woodie v. Wilkesboro,* 159 N. C., 353; *Fisher v. New Bern,* 140 N. C., 506, and other cases, we have held that when a municipality is engaged in supplying water to the individual citizen under a contract for profit or for pay it must be considered and dealt with as if it were a private owner, but, as shown in *Harrington v. Greenville,* 159 N. C., 632, this must be understood as referring to the ordinary burdens and liabilities incident to the private business relations; but in reference to its work for the public generally, such as procuring its water supply and extending it, providing water for fire protection and sanitation purposes, and the like, the municipality is to be regarded as a governmental agency and, as such, possessing and capable of exercising the powers and privileges conferred upon it by law.

Again, it is contended that section 6 of the act, making provision as to notice and for the collection of the assessment, does not refer to the laying of water pipes, but in its terms is restricted to the improvement of the streets, but a perusal of the statute, and more especially of the next preceding sections 4 and 5, will clearly disclose that the laying of the water pipes was regarded as a part of the street improvement so described in these sections, and the provisions of section 6, by correct interpretation, were clearly intended to include and apply to the laying of the water pipes as well.

On careful consideration, we find no error in the judgment below, and the same is

Affirmed.

J. F. COTTON v. THE FISHERIES PRODUCTS COMPANY AND HARRY B. THERIAN, GENERAL MANAGER, AND THOMAS H. HAYES, PRESIDENT.

(Filed 3 January, 1919.)

1. Slander—Corporations—Officers.

A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances.

2. Same—Joint Torts—Actions—Parties.

Where slanderous words uttered by an officer or agent of a corporation are actionable both as against the corporation and its agent uttering them, both the corporation and its agent may be joined as parties in a single action.

3. Slander—Moral Turpitude—Actionable Per Se.

Slanderous words are actionable *per se* when they impute to another the commission of a crime that involves moral turpitude; and it is not

required that they be in express terms, for the significance of the utterance may be determined by the words themselves in view of attendant circumstances, the tones, gestures and the accompanying acts of the parties, etc., and their reasonable effect, by fair intendment, upon the apprehension of the listeners.

4. Slander—Corporations—Officers—Actionable Per Se—Actions—Parties—Joint Torts.

Where the complaint in an action for slander against a corporation and its officers or employees alleges, in effect, that the plaintiff's goods were being sent by him to another town, when the general manager of the company, acting under the direction of its president, unpacked and searched them, stating in the presence of several onlookers that the corporation had lost certain personal property while the plaintiff was its manager, for which the search was being made and which the president of the corporation suspected the plaintiff of having taken, with further allegation that the words used intended to charge the plaintiff with having feloniously appropriated them: *Held*, the alleged language of the defendant corporation's general manager, taken in connection with his accompanying acts in causing the plaintiff's goods to be publicly opened and searched, under the direction of its president, amounted to an accusation of larceny, actionable *per se*, and the company and its officers were properly joined in the one action.

ACTION for slander, heard on demurrer to complaint, before *Stacy, J.*, at August Term, 1918, of BRUNSWICK.

There was judgment overruling the demurrer, and defendants appealed.

J. D. Bellamy & Son and Cranmer & Davis for plaintiff.
Rountree & Davis and C. E. Taylor for defendants.

HOKE, J. The complaint, in effect, alleged that just prior to the slanderous utterance plaintiff had been the general manager of defendant company, oil and fertilizer business, and had done his duty honestly and faithfully; that having left the employment of the company, he was in the act of having his household goods moved to the dock, with a purpose of being placed on the boat, when the bearers were stopped by direction of defendant Harry B. Therian, present manager, acting under orders of his codefendant, the president, the goods opened and searched, accompanied by the statement, in the hearing of divers persons, that plaintiff was suspected of having taken the property of defendant company, consisting of towels, bed sheets, etc. In the portion of the complaint more directly relevant, it is alleged: "Upon arriving at the office this plaintiff was informed by the said Mr. Herle that the defendant Harry B. Therian had phoned to him to tell the plaintiff not to remove his household goods until he, the said defendant Harry B. Therian, returned to the plant that afternoon. The plaintiff saw the defendant

Harry B. Therian immediately after his return to the plant and was publicly informed by the defendant Harry B. Therian that he (Therian) had orders from Mr. Thomas H. Hayes, president, not to allow this plaintiff to remove his household goods until they were opened and searched, as he (Mr. Hayes) suspected that this plaintiff had taken the property of the defendant corporation, consisting of towels, bed sheets, etc., which had been missed since the plaintiff left the employment of the defendant corporation.

"Sixth. That in accordance therewith, on the said premises and after the said declaration was made in the presence of divers persons, and in a public manner, the said Therian proceeded to open the household goods and other effects of this plaintiff that had been bundled and securely packed, and rummaged among the said property to see if the plaintiff had misappropriated any of the said defendants' property, and found nothing.

"Seventh. That the said words and acts were plainly intended to mean and be imported and charge this plaintiff with feloniously appropriating and stealing the property of the said defendant corporation, and held this plaintiff up to the public contempt and ridicule, thereby blackening his reputation and attempting to ruin his character, from which the plaintiff has suffered very serious and heavy damages, being very greatly humiliated, shocked and belittled by the reason of the said language and action of the said defendant being publicly made on the said premises in the presence of divers people.

"Eighth. That this plaintiff was detained on the said premises for more than a day in consequence of the said opening of his household effects and inspection of the same, and by the use of the said language and declaration this plaintiff was willfully, deliberately, and recklessly slandered by the said language used by the said defendant therein acting for and in behalf of said defendant corporation, by the orders of Thomas H. Hayes, president, the said slander being made without any just or probable cause, and was recklessly, willfully and deliberately made."

There was further allegation to the effect that plaintiff had filled other positions of responsibility acceptably before being employed in this company, and was then engaged in interesting persons in an enterprise of similar character, and the charge was maliciously made with a view of humiliating plaintiff and harming him in the estimate of his business associates, etc.

Defendants demurred on the ground: (1) That there was misjoinder both of parties and causes of action; (2) that the words used did not amount, *per se,* to an actionable wrong; (3) that there is no allegation of authority for the defamatory utterances on the part of the company;

but, concurring in the view of the court below, we are of opinion that none of these positions can be sustained.

It is the accepted principle here and elsewhere that corporations may be held liable both for the willful and negligent torts of their agents, and that the principle extends to actions for slander when the defamatory words are uttered by express authority of the company or within the course and scope of the agent's employment. Owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not perhaps be imputed to the company as readily as in more deliberate circumstances—that is, they should not be so readily considered as being within the scope of an agent's employment; but the basic principle is recognized and may be applicable whenever, as stated, the slander has been expressly authorized by the company, or when the defamatory words have been used in the course of the agent's employment and authority for their utterance may be fairly and reasonably inferred. *Cooper v. R. R.,* 170 N. C., 490; *Seward v. R. R.,* 159 N. C., 241; *Sawyer v. R. R.,* 142 N. C., 1; *Jackson v. Telegraph Co.,* 139 N. C., 347; *Hussey v. R. R.,* 98 N. C., 34; *Bank v. Graham,* 100 U. S., 699; *R. R. v. Quigley,* 62 U. S., 202; *Palmeri v. R. R.,* 133 N. Y., 261; *Maynard v. Fireman's Fund Ins. Co.,* 34 Cal., 48.

And in such case, as shown in *Hussey v. R. R., supra,* "The corporation and the employee by whose act the injury was done may be joined in the action." Our decisions are to the effect, further, that in cases of this character, slanderous words will be regarded as actionable, *per se,* when they impute to another the commission of a crime that involves moral turpitude. Thus, in the recent case of *Jones v. Brinkley,* 174 N. C., 23, it was contended that as the larceny of goods under twenty dollars had been reduced to the grade of a misdemeanor, a charge of stealing one gallon of ice cream was not a slander *per se;* but the position was disapproved and it was held, as stated, *Clark, C. J.,* delivering the opinion, "That where the charge, if true, would subject the person to an indictment for a crime involving moral turpitude, *or* subject him to an infamous punishment on conviction, the words will be in themselves actionable," citing 25 Cyc., pp. 270-272, and sec. 17, R. C. L., p. 265.

Again, it is recognized that in order to an accusation of this kind, it is not required that the charge be made in express terms, but the significance of the utterance may be determined by the words themselves, and in view of the attendant circumstances and in this connection, the tones and gestures and accompanying acts of the parties may at times be properly considered; and if, when so interpreted, the words, by fair intendment and to the reasonable apprehension of the listeners, amount to such charge they may be so construed and dealt with. *S. v.*

Howard, 169 N. C., 312; *Webster v. Sharp,* 116 N. C., 466; *Bigley v. Nat. Fidelity Co.,* 94 Neb., 813; Odgers on Libel and Slander, pp 121-24-39; 17 R. C. L., pp. 313-408.

A correct application of these principles are in full support of his Honor's ruling, and, on the record, we do not hesitate to hold that the language of defendant's employees, when taken in connection with their accompanying acts in causing plaintiff's goods to be publicly opened and searched in the presence of numbers of listening observers, amounted, in effect, to an accusation of larceny of the company's goods, actionable *per se,* as shown. That the pleadings contain allegations of authority from the company, by direct averment or by fair intendment as the permissible and natural inference, and that under *Hussey v. R. R., supra,* and other cases of like import, the company and the officers directly "responsible for the injury" have been properly joined as defendants. The authorities cited by appellant are chiefly cases in which the words were not actionable *per se,* or it was held that they did not express a defamatory charge and are not apposite or controlling on the facts presented on this appeal.

There is no error, and the judgment overruling the demurrer is Affirmed.

A. T. DORSEY v. NORTH CAROLINA TALC AND MINING COMPANY.

(Filed 3 January, 1919.)

1. Appeal and Error—Reference—Findings.

Exceptions to the findings of fact set out in a referee's report approved by the trial judge will not be considered on appeal when supported by legal evidence.

2. Contracts — Breach — Timber — Deeds and Conveyances — Damages — Actions.

Where the vendor of standing timber has conveyed it by deed, with covenant of seisin under contract that the purchaser will manufacture it into lumber and pay therefor upon a stumpage basis, as cut, and the parties have been enjoined by the owner of the superior title of a part of the lands containing the most valuable timber, after the purchaser had cut over the remaining portion: *Held,* the purchaser was justified in stopping further performance of his contract, and his action will lie against his vendor for damages for breach of contract, wherein the rights of both parties may be determined.

3. Contracts— Breach— Fraud— Representations— Knowledge—Vendor and Purchaser.

The right to rescind a contract is not dependent upon fraud or misrepresentations alone, and may rest on other grounds, such as breach of

warranty, or mistake, or on the ground that a vendor is held to know the truth of his statements which are material and have induced the purchaser to enter into the contract.

4. Vendor and Purchaser—Contracts—Breach—Damages—Profits—Timber.

Where the purchaser of standing timber, to be paid for by stumpage as it was being cut, has cut the timber from the lands, excepting a certain more valuable part, and as to this he had made preparation and incurred expense, when he was stopped by the vendor's breach of contract, he may recover the profits he would have made on the uncut timber which are ascertainable with reasonable accuracy, including the expense, etc., incurred.

5. Appeal and Error—Reference—Findings—Vendor and Purchaser—Damages—Counterclaim.

Where the referee finds, upon legal evidence, that the purchaser of timber had paid his vendor for all damages caused to the latter's property in cutting timber from his lands, the findings, when sustained by the trial judge, are conclusive, and his exception to the allowance of his counterclaim for them will not be considered on appeal.

ACTION for damages for breach of contract, heard before *Lane, J.*, at Spring Term, 1918, of SWAIN, upon exceptions of defendant to report of referee T. J. Johnston. The court overruled exceptions and confirmed report. From judgment for plaintiff defendant appealed.

S. W. Black for plaintiff.
Frye & Frye and Bourne, Parker & Morrison for defendant.

BROWN, J. The report of the referee is a very clear and intelligent statement of the controversy, and from the findings we gather these facts, supported by ample evidence:

The defendant conveyed to plaintiff, with covenants of seisin and warranty, certain timber on a boundary of land, particularly described, lying in Swain County, in consideration of one thousand dollars cash and other considerations expressed in the written contract. The plaintiff contracted to cut and manufacture into lumber the kind of timber conveyed and to pay stumpage as it was cut. Prior to execution of the contract defendant sent its agent to point out the boundaries to plaintiff's agent, which was done. Plaintiff, immediately upon the signing of the contract, moved his logging outfit, consisting of oxen, horses, sawmills, etc., upon the boundary, beginning work in the fall of 1913, and continuing until about 1 February, 1915, when he ceased work and removed his logging operation from the property.

Prior to plaintiff's removal from the property, the Whiting Manufacturing Company, claiming a large section of the boundary included in plaintiff's contract, caused an injunction to issue from the Superior Court of Swain County against the plaintiff and the defendant, enjoin-

ing the plaintiff from going upon that portion of the tract of land claimed by it. Plaintiff ceased work at once as he was then operating on the disputed territory, upon which he had already cut 121 cords of wood at an expense of $272,25, constructed a flume, built roads, and made all necessary preparations for logging.

After plaintiff was enjoined from further operation on the section of this boundary claimed by Whiting Manufacturing Company, no effort was made by the defendant to adjust the controversy, nor was any offer made to turn over to plaintiff any other lands in lieu of the boundary claimed by the Whiting Manufacturing Company. The plaintiff, after allowing his mills and teams to remain idle several weeks, having practically completed all of the operation on the remainder of the boundary, removed his teams, mills and logging equipment, and demanded settlement under his contract with the defendant.

The referee found as a fact that the land which plaintiff was prevented from cutting over because of the injunction contained 180 acres, mainly situated on the watershed of Ledbetter Creek, and the said boundary included a large amount of the best timber on the entire boundary; that said land had been pointed out to plaintiff's agent prior to the signing of the contract by the agent of the defendant as being a portion of the boundary included in the contract.

The referee, finding as a fact that at the time plaintiff was enjoined by the Whiting Manufacturing Company he had completed the logging of remainder of the boundary, concluded as a matter of law that the failure of title on part of the defendant to 180 acres of land covered by its contract with the plaintiff was such a breach of contract on part of the defendant as justified the plaintiff in abandoning the further prosecution of the contract, and when he had thus rightfully terminated the same that the parties were at arm's-length and entitled to a settlement of all matters between them, including the question of damages sustained by either party and any sums due by either of said parties to the other under the terms of the contract.

The findings of fact of the referee are all supported by evidence and have been approved by the judge. In such case it is well settled that we will not undertake to review them. *Dumas v. Morrison,* 175 N. C., 435; *Maxwell v. Bank,* 175 N. C., 180. This renders it unnecessary to consider many of defendant's exceptions.

The defendant excepts to the ruling of the court sustaining the referee's first conclusion of law: "That the failure of title on part of the defendant to 180 acres of land covered by its contract with the plaintiff under the conditions stated in referee's 13th, 14th, 15th, 16th, and 17th findings of fact was such a breach of the contract on part of the defendant as justified the plaintiff in abandoning the further prose-

cution of the work under said contract." We are unable to see any error in such ruling. The referee had found as a fact that the lines of the boundary included in the contract were pointed out to the plaintiff's agent by the agent of the defendant before the contract was signed. The 180 acres to which title failed was included in this contract, and the inclusion of this land was one of the material inducements of the plaintiff to enter into the contract. The plaintiff had entered into the contract expecting to log this portion of the boundary and, as would necessarily follow, to secure the profits accruing from the manufacture and sale of same.

It was admitted that defendant's title to the 180 acres had failed, and that both plaintiff and defendant were enjoined from cutting on it. The plaintiff had finished logging all the remainder of the boundary and there was evidently nothing else for him to do but move away. He could not continue operations in face of an injunction binding upon himself as well as defendant. The defendant, by its contract, covenanted to and with the plaintiff that it was seized of the timber in fee and had the right to convey the same. That there was a breach of these covenants is found by the referee and not denied. Under such conditions the plaintiff had a right to abandon the contract and demand damages for its breach.

The right to rescind a contract does not rest upon fraud alone. It is often placed on other grounds than mere misrepresentation, such as warranty, or mistake, or on the ground that a vendor is held to know the truth of statements made by him concerning the property sold. Page on Contracts, sec. 152.

The plaintiff had never received back in any form the one thousand dollars advanced defendant on the contract, so it is found, and consequently is entitled to recover it, together with such damages as he sustained and that were reasonably within the contemplation of the parties.

The referee concluded as a matter of law that plaintiff was entitled to recover certain profits he would have made in cutting the timber from the 180 acres of land from which he was prevented by reason of the superior title of the Whiting Manufacturing Company, together with the money he had expended on this land preparing to log it and manufacture the timber.

In his 16th finding of fact, the referee finds that this 180 acres of land was situated on the waters of Ledbetter Creek and included a large amount of the best timber to be found on the entire boundary. In his 17th finding of fact he finds that at the time plaintiff was stopped from work by the injunction that he had completed the building of the flume up Ledbetter Creek to the line of this land; that he had built a road thereto and had located one of his mills at a point accessible to said

area and had commenced cutting timber on this part of the boundary; that he had incurred all the incidental expenses necessary toward the operation of this portion of the boundary, and his only additional expense would have been the cutting, logging and manufacture of the lumber. Upon these findings, the losses of plaintiff can be estimated with reasonable accuracy, including such profits as he had a right to expect to make from a performance of the contract.

We think the case comes well within the rule clearly stated by *Justice Hoke* in *Wilkinson v. Dunbar,* 149 N. C., 20: "When prospective damages are allowed to the injured party as arising under a breach of contract they must be such as are in reasonable contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered, though plaintiff can only give his loss approximately. Compensation for prospective losses may be recovered when they are such as in the ordinary course of things are reasonably certain to ensue. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained. This rule is subject to two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they entered into the contract; that it must be such as naturally might be expected to follow this violation."

The contract between the plaintiff and defendant is set out in detail by the referee and is of such character that damages for its breach, both past and prospective, may be ascertained with reasonable certainty.

The defendant excepts to the ruling of the court upon its counterclaim. The defendant in its answer alleged that the plaintiff by his operation had damaged its property in the sum of $10,000, and set up said amount as a counterclaim. Evidence was offered by both parties upon the matter. The referee found as a fact that the plaintiff had practically completed his contract; that he had taken off all of the timber included thereon on that portion of the boundary he had operated over at the time he was served with the injunction; that he had paid the defendant more than $4,000 for the timber taken off, and that this amount fully compensated the defendant for any damage to the property. These findings of fact are conclusive and disposes of the counterclaim.

Upon a review of the record, we must affirm the judgment of the Superior Court.

Affirmed.

E. C. BESSELIEW AND J. W. YATES, RECEIVERS OF THE SOUTHERN MUTUAL HOME AND REAL ESTATE COMPANY, v. C. C. BROWN ET AL.

(Filed 3 January, 1919.)

1. Corporations—Directors—Trusts and Trustees—Negligence.

The directors and managing officers of a corporation are trustees, or *quasi* trustees, in respect to their corporate management, and while they are not responsible, as a rule, for a loss arising from mere errors of judgment or from slight omissions, they may, in proper instances, be held liable for loss or depletion of the company's assets due to their willful or negligent failure to perform their official duties or the failure to exercise the care and attention that a prudent man should exercise in like circumstances and charged with like duties or in the conduct of his own affairs of a similar kind.

2. Same—Receivers—Actions.

Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver.

3. Pleadings—Demurrer—Corporations—Directors—Negligence—Damages.

Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges, in effect, that the defendants had left the entire management of the corporate business to the secretary without supervision or requiring bond or accounting from him, etc.; that they had not held a directors' meeting for a year, in which time the secretary of the company had misappropriated a large sum of money, causing the insolvency, and that judgment had been obtained against the corporation; that they did not know that the secretary had defaulted until he had confessed thereto, etc.: *Held*, a good cause of action is stated, which, if established, the defendants, or those of them in default, may be held liable for the loss which resulted as the proximate cause of their negligence, and a demurrer thereto is bad.

4. Corporations—Receivers—Directors—Negligence—Shareholders—Contributory Negligence—Pleadings—Demurrer.

Where a receiver has been appointed for a corporation, there is a presumption that it is insolvent, having unpaid creditors whose rights are to be considered; and where, in the receiver's action against the directors to recover damages for the defendants' neglect of duty, the complaint alleges a good cause of action the contributory negligence of the stockholders in neglecting their rights for a period of time will not bar a recovery, and a demurrer is bad.

5. Pleadings—Aider—Speaking Demurrer.

Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges a good cause of action for damages arising from their negligence in managing the corporate affairs, a demurrer may not be aided by allegations of facts not therein appearing, for such would be a speaking demurrer, condemned both under the common law and code systems of pleadings.

6. Corporations — Directors — Negligence— Compromise— Estoppel— Damages.

Where the directors of a corporation negligently entrusted the management of the corporate affairs to its secretary, who misappropriates the company's funds, and the directors thereafter secure the repayment of the same by mortgage, which it subsequently compromises and pays the money thus received to the corporation, the acceptance of the money does not estop the receiver from maintaining his action for the loss sustained, and this may only be considered in reduction of the damages recoverable.

ACTION by the receivers of said corporation to recover of the directors and managing officers of same for loss of company's assets, due to alleged negligence of defendants in failing to perform their official duties, etc., and heard on demurrer to the complaint before *Lyon, J.*, at April Term, 1918, of NEW HANOVER.

There was judgment overruling the demurrer, and the defendants excepted and appealed.

A. G. Ricaud and E. T. Burton for plaintiffs.
E. K. Bryan and Robert Ruark for defendants.

HOKE, J. The complaint alleges that in 1904 the company in question was duly incorporated and organized pursuant to the laws of the State, and engaged in the transaction of business as contemplated by the charter, etc.; that in 1916, on petition filed and approved by two-thirds of the stockholders, the company was declared insolvent and plaintiffs appointed receivers and authorized and directed to collect and take charge of company's assets, etc., the order appointing said receiver containing, among other things, a judgment against the company in favor of A. C. Dawson for $848.70, which is annexed and made part of the complaint as Exhibit A, and on leave duly granted the present suit was instituted against defendants, the directors, some of whom were also members of the executive committee and managing officers of the company.

It was further alleged, in effect, that the defendants, who had long been directors of the company and some of whom, as stated, were its managing officers and members of the executive committee, had utterly failed to attend to the business of the company or to perform the duties incumbent upon them and incident to their respective positions, but had turned over the entire management of the company and its business and the custody and care of its assets to one M. C. Hammond, the secretary, and without any supervision or control on their own part; that they did not attend the directors' meetings, as required; they took no bond from said Hammond; did not have his accounts audited nor even require any reports from him, with the result that he made away with the company's assets to the amount of $12,636.19, causing its insolvency, and in

July, 1915, had written a letter to one of defendants, C. C. Brown, confessing his default, which is also made a part of the complaint.

It is further alleged that the directors took a mortgage from the sister of said Hammond to secure $6,000 of the sum embezzled by him, and thereafter the directors wrongfully accepted $3,000 in adjustment of the company's claim against Hammond.

Having set forth these matters with great fullness of detail, averment is further made, in section 26 of the complaint: "That said defendants were further guilty of reckless negligence in failing to discharge their duties as trustees, by reason of being directors of said company, in that they failed and neglected to hold and attend meetings as directors, as required by law and the by-laws of the company, in order to look after, scrutinize, and protect the business of the corporation and the interests of the stockholders and creditors of same. That during the year 1914 there was only one director's meeting for the entire year, which was held on the 22d day of January, 1914, and there was no other meeting of the board of directors until 21 January, 1915, and that there was no other meeting until after the defalcation of Hammond was acknowledged by him in August, 1915, and during this period of time, from January, 1914, until August, 1915, the business of the corporation was left almost entirely, if not wholly, to the management, control, supervision, and destruction of a self-confessed embezzler, without any restraint, control or direction whatever from any other source," and judgment is then asked for the amount of the loss due to the inattention and neglect of the defendants, etc.

It is fully established in this jurisdiction and elsewhere that the directors and managing officers of a corporation are to be properly considered and dealt with as trustees, or *quasi* trustees, in respect to their corporate management, and may, in proper instances, be held liable for loss or depletion of the company's assets due to their willful or negligent failure to perform their official duties. They are not, as a rule, responsible for mere errors of judgment (*Fisher v. Fisher,* 170 N. C., 378, and authorities cited), nor for slight omissions from which the loss complained of could not have reasonably been expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty, usually the care that he shows in the conduct of his own affairs of a similar kind; and if there is a breach of legal duty in this respect, causing a loss of the company's assets, the corporation may sue, and in case of insolvency the action can be maintained by the receiver. *Steele v. Hardware Co.,* 175 N. C., 450; *Whitlock v. Alexander,* 160 N. C., 465; *Pender v. Speight,* 159 N. C., 612; *McIver v. Hardware Co.,* 144 N. C., 478; *Houston v. Thorn-*

ton, 122 N. C., 365; *Solomon v. Bates,* 118 N. C., 311; *Townsend v. Williams,* 117 N. C., 330; *Hill v. Lumber Co.,* 113 N. C., 173; *Briggs v. Spalding,* 141 U. S., 132; *Fisher v. Pair et al.,* 92 Md., 245; *Olney v. Conament Land Co.,* 16 R. I., 592; *Hodges v. New Eng. Screw Co.,* 1 R. I., 312; *Williams v. McKay,* 40 N. J. Eq., 189; *Bosworth, Receiver, v. Allen et al.,* 168 N. Y., 157; Cook on Corporations, secs. 701-703 and 869; 2 Thompson on Corporations, sec. 1410; 3 Pomeroy Eq. Jur., sec. 1090 *et seq.;* Clark on Corporations, p. 515.

In *Briggs v. Spaulding, supra,* the controlling principle is stated as follows: "Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figure-heads; they are entitled under the law to commit the banking business, as defined, to their duly authorized officers; but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing if that ignorance is the result of gross inattention."

In *Fisher v. Pair, supra,* it is held, among other things: "Equity has jurisdiction of a bill filed by a corporation, or by its receivers when insolvent, to enforce the personal liability of the directors of the corporation for negligence in the performance of their duties. Directors or managers of a corporation are required to perform their duties with reasonable skill and care, and are answerable for neglect to exercise that degree of prudence that men generally exercise in their own affairs under like circumstances. It is not enough that directors employ officers and agents of good character and skill, but the conduct of the agents must be watched with such vigilance as a discreet business man would exercise over his own affairs. The directors are liable if they suffer the corporate property to be lost by gross inattention to the duties of their trust, and are not relieved from liability because they had no actual knowledge of wrong-doing if that ignorance was the result of gross negligence."

In that case, *Associate Justice Fowler,* delivering his learned and well-considered opinion, makes further reference to the duty properly imposed upon directors, as follows: "What, then, is the care which is required of directors? There ought to be no difficulty about the answer to this question. Directors are selected by the stockholders to manage the concerns of the corporation, and it would seem, therefore, to require no authority, nor indeed more than the bare statement of the fact, that, as *Lord Hatherley* said in *Land Co. v. Lord Fermoy,* L. R. 5 chap. 770, 'If the directors sleep, instead of being awake, their being asleep could not exempt them from the consequences of not attending to the business of the company.' It is not, of course, to be expected that the directors

shall attend to the current business, but they must, at their peril, give such attention to and so manage the concerns of the company that they may be able at all times to know what their executive officers and other agents as well as their fellow-directors are doing, and how they are acting in respect to the funds and property of the corporation. In *Williams v. McKay,* 40 N. J. Eq., 189, *Chief Justice Beasly* said, 'I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then when disaster to the innocent and helpless *cestuis que trustent* ensued stifled all complaints of their neglect by saying, we did not do these things and we know nothing about them. . . . The neglectful acts in question cannot be regarded by the Court as isolated instances, for they run through the whole period of the life of the institution, and thus evince a systematic and habitual disregard of the company's charter and a very striking indifference to the security of the money held in trust by them.' "

Under the doctrine as declared and approved in these well-considered authorities the plaintiff has undoubtedly set forth a good cause of action, and if on the hearing the facts are established as stated, defendants, or those of them shown to be in default, may be held liable for the loss which resulted as the proximate consequence of their negligence.

In *Houston v. Thornton* and *Solomon v. Bates, supra,* recovery by a stockholder against individual directors was sustained, but there, as will appear from a perusal of those well-considered cases, the individual stockholder had suffered the injury, having been induced to acquire and pay for stock comparatively worthless by the negligent or fraudulent representations of the directors sued. But where, as in this case, the wrong has been done to the corporation, it must sue or, on proper averment, the company or its legal representative should ordinarily appear as a party either plaintiff or defendant. See *Pender v. Speight, supra; Braswell v. Bank,* 159 N. C., 629; *Coble v. Beal,* 130 N. C., 533; Pomeroy Eq. Jur., sec. 1090 *et seq.*

As we understand their position, however, defendants in this case have raised no objection to the form of the suit, nor by reason of improper parties, but rest their demurrer on the ground:

(1) That the court will take judicial notice of the fact that in the long period covered by the alleged default of defendants the stockholders themselves should have had their regular meetings, and are guilty of contributory negligence, barring recovery, in failing to have the mismanagement corrected, and in the election of Hammond as director.

(2) That the company, through its directors, having received and retained the $3,000 paid in adjustment of Hammond's default, are estopped from any suit on account of his said acts: but neither objection can for a moment be maintained.

As to the first position, it would suffice to say that the corporation being insolvent and in the hands of receivers there are, presumptively, creditors whose rights are to be considered, and as a matter of fact an unsatisfied judgment against the company is annexed as a part of the complaint. But apart from this, it is the accepted position that a demurrer must restrict itself to the facts as they appear in the complaint, and if the legal position insisted on be conceded, it nowhere appears in the complaint that there has been any negligence on the part of the present holders of the shares of stock barring recovery. Giving the fault its technical term, this at best would be a speaking demurrer, condemned both under the common law and code systems of pleading. *Von Glahn v. DeRossett,* 76 N. C., 292; Green Pl. & Pr. Under Code, sec. 878.

In the last citation it is said: "A demurrer is only appropriate when the defect or objection appears on the face of the pleading, as it is not the province of a demurrer to state objections not apparent on the face of the pleadings, nor can it do so either under the old or the new system. Such a practice could not be tolerated."

As to the second ground, if this were an action seeking further recovery against Hammond the position might require consideration, but the action, as we have seen, is against the defendants, the directors and managing officers of the company, to recover for the loss of the company's assets, attributable to their own negligent breach of duty, the taking of this $3,000 when they had a mortgage to secure $6,000 being one of the items of charge. This may have been a mere error of judgment on their part, or it may have been the best course to take under the circumstances presented, but we fail to see how it could inure to the protection of defendants, except in reduction of the damages, if any, that may be shown against them, and this effect is allowed it in the complaint.

There is no error, and the judgment overruling the demurrer is

Affirmed.

H. D. GURLEY v. W. H. WOODBURY.

(Filed 3 January, 1919.)

1. Appeal and Error—Objections and Exceptions—Reference—Admissions.

Where a party to a reference has excepted and preserved his right to a trial by jury, but the uncontroverted matters are determinative of the action, this right becomes immaterial.

2. Compromise—Subsequent Actions—Counterclaims—Actions.

Where an action has been compromised according to the written agreement of the parties, a counterclaim in another action between them em-

braced in the former action and the compromise agreement of the parties cannot be maintained.

3. Compromise—Contracts— Banks and Banking— Shares of Stock— Book Values—Records—Actions—Corporations.

Where the action depends upon the terms of a compromise of a former action, as to the value of certain shares of bank stock—that is, shall be the book value of the shares as shown by the records and books of said bank: *Held*, such book value should be ascertained by deducting the liabilities from the assets shown on the books and records of the bank; and it appearing that the parties had knowledge of a call of the directors to make good a deficiency of the capital stock in a certain amount, or go into liquidation, according to an order of the controller, on file as a record of the bank, the order of the controller was within the contemplation of the parties and to be considered as a record of the bank in ascertaining the book value of the shares under the terms of the agreement.

4. Banks and Banking—Controller of Currency—Orders—Shares of Stock—Values.

The decision of the controller of the currency as to an impairment of the capital stock of a bank is conclusive and final on the stockholders and the courts.

APPEAL by defendant from *Lane, J.*, at the April Term, 1918, of CHEROKEE.

This is an action to recover money. The matters in controversy were referred by the court against the will of the defendant, and his exception thereto was duly noted, but the following facts do not seem to be in controversy:

On the first day of June, 1914, the Bank of Dahlonega, Georgia, held a note of that date payable to said bank four months after date, with interest at 8 per cent after maturity, which rate of interest was permissible by the laws of Georgia, signed as maker by the defendant Woodbury and endorsed by the plaintiff Gurley; that the defendant Woodbury deposited with said bank as collateral security for the payment of said note thirty shares of stock of the North Georgia National Bank, with full authority to sell the same upon default in the payment of said note and to apply the proceeds to the note; that said note was not paid at maturity and said shares of stock were sold and were bought by the plaintiff Gurley for the sum of $360, which was credited on said note; that the transfers on said shares of stock when deposited by defendant as collateral security were signed by the defendant Woodbury, but his signature was not witnessed, and said North Georgia Bank refused to issue new stock to the plaintiff for said shares of stock because of the absence of a witness to the signature of the defendant; that the plaintiff thereupon sent the certificates of stock to the American National Bank of Asheville for the purpose of having the same properly witnessed and the signature of the defendant acknowledged by him; that

the defendant then commenced an action in the Superior Court of Buncombe County for the purpose of recovering said stock, alleging that the sale was illegal and the result of a conspiracy, and that he had been damaged thereby; that issue was joined in said action in Buncombe County, and thereafter all matters in controversy in said action and between the parties, the plaintiff herein being a defendant in said action and the defendant herein the plaintiff, were compromised and settled and the following agreement was entered into between the plaintiff and the defendant:

"This agreement, made and entered into this the 21 day of April, 1916, between W. H. Woodbury, of the county of Cherokee, State of North Carolina, and H. D. Gurley, of the county of Cobb, State of Georgia,

"Witnesseth: That, whereas there is now pending in the Superior Court of Buncombe County, North Carolina, a claim and delivery proceeding in favor of W. H. Woodbury against H. D. Gurley and the American National Bank, involving the right of possession of thirty shares of the North Georgia National Bank stock, of Blue Ridge, Ga., being certificate numbers 124 for ten shares, 145 for five shares, 154 for four shares.

"Whereas a judgment was obtained in the Superior Court of Lumpkin County at the October Term, 1915, against W. H. Woodbury, principal, and H. D. Gurley as security, upon a certain promissory note in favor of the Bank of Dahlonega, as collateral security for which the stock in question was originally deposited with said bank; and

"Whereas at a sale had on the 12th day of January, 1915, by the Bank of Dahlonega, H. D. Gurley purchased the said shares of stock in question, the consideration therefor being credited on the note in favor of said bank; and

"Whereas the said W. H. Woodbury contends that the said sale was illegal and the price bid and paid by said Gurley for said stock was inadequate and insufficient, the said contention being the basis for said action in said North Carolina court:

"Now, for the purpose of settling said action in the Superior Court of Buncombe County, North Carolina, and settling all differences between the parties hereto, it is agreed by and between them as follows:

"H. D. Gurley, on his part, agrees, upon the dismissal of said action in North Carolina and the proper signing of the transfers of said certificates by said W. H. Woodbury, to accept the said stock, to attend the meeting of the stockholders of the said North Georgia National Bank to be held on the 18th day of May, 1916, at the office of company at Blue Ridge, Ga., in accordance with the call therefor and notice of

assessment, either in person or by proxy, and on said date to allow the said W. H. Woodbury the actual book value of the said shares of stock, as shown by the records and books of said bank, as a credit upon the said execution in favor of said Bank of Dahlonega, disregarding the amount bid at the sale had by the said bank, heretofore mentioned, with the additional right granted to W. H. Woodbury to sell said stock for cash at any time between this date and the said 18th day of May, 1916, for any amount in excess of the book value thereof, credit to be given for the proceeds of said sale. Should the value of said stock exceed the amount of the bid of said Gurley at said sale, the credit to be allowed on said execution is to be based upon the original indebtedness, a credit for said amount having been allowed by said Bank of Dahlonega thereon prior to suit and judgment.

"The said W. H. Woodbury agrees, on his part, to immediately withdraw the suit pending in said Superior Court of Buncombe County, North Carolina, and to sign the transfers upon the stock certificates to the said H. D. Gurley.

"In witness whereof, each of said parties hereto have set their hands and affixed their seals, the day and year above written. Signed in duplicate.

"W. H. WOODBURY.
"H. D. GURLEY.
"HUGH A. HILL,
"Notary Public, Cobb County, Georgia."

The agreement was entered into on 21 April, 1916, and the notice of assessment referred to therein is a notice of an assessment by the controller of the currency of date 5 April, 1916, directed to the directors of the North Georgia National Bank and notifying them that the capital stock of said bank was impaired, the amount of the impairment, and stating in detail the items of worthless assets carried on the books of the bank and directing the directors to call a meeting of the stockholders for the purpose of an assessment on the stockholders to make good said impairment of the capital stock or to take steps to put said bank in liquidation; that pursuant to said notice the meeting of 18 May, 1916, was called, at which meeting the defendant was present and voted in favor of selling all of the property and assets of the bank to the Ferrin County Bank upon its assuming the liabilities of the North Georgia Bank, except its liabilities to stockholders; that said notice and assessment of the controller was on file and among the records of the North Georgia Bank on 18 May, 1916, the defendant himself testifying "it was among the records of the bank"; that the plaintiff did not attend the meeting on 18 May, 1916, but there is neither allegation nor evidence that the value of the stock was in any way affected by his absence;

that the value of said stock deposited as collateral security on 18th May as ascertained by deducting from the assets carried on the books of the bank the liabilities appearing on the books, and without considering the notice and assessment of the controller, was $125 a share; that the value of said stock on 18 May, 1916, as ascertained from the assets and liabilities shown on the books as modified by the notice and assessment of the controller was $19.13 per share, and the actual market value of said stock on said date was nothing. The plaintiff has paid said note to the bank.

The defendant insisted on a jury trial, which was denied, and he excepted.

His Honor rendered judgment in favor of the plaintiff for the amount of the note, except for attorneys' fees, subject to a credit of $459.12 as of 18 May, 1916, which was the value of the stock of the North Georgia Bank ascertained by deducting the liabilities from the assets carried on the books of the bank as modified by the notice of assessment of the controller of the currency, and both parties appealed.

The plaintiff assigns as error the refusal to render judgment in his favor for the face value of the note without allowing any credit for the stock.

The defendant assigns the following errors:

(1) His Honor erred in the following ruling: The court is of opinion that none of the issues tendered by the defendant and filed by him before the referee are issues of fact raised by the pleadings, evidence, report, and exceptions. The court, therefore, denies the demand of the defendant for a jury trial upon said issues, or any of them.

(2) The court erred in overruling the defendant's exception "C" to the referee's report, to wit, his conclusion of law "C," as follows: "That the decision of the controller of the currency dated 5 April, 1916, that losses aggregating $31,259.31 had been sustained by the North Georgia National Bank, and thereafter given credit for the $7,000 surplus fund, the capital stock was impaired to the amount of $24,260, is a conclusive decision that such losses had been sustained in so far as the corporate books were concerned and the status of the corporation was affected, and that the effect of such determination and adjudication was to charge the amount of such losses to the loss account upon the books of the bank, and that such impairment of the capital stock would be considered in arriving at the book value of the stock of the corporation."

(3) The court erred in overruling defendant's exception "D" to the referee's conclusion of law as follows: "The referee erred in concluding as a matter of law that the defendant is not entitled to recover upon the counterclaim set up in the answer upon the ground that all differences

between the parties were settled and agreed upon under the terms of the settlement of 21 April, 1916."

(4) The court erred in overruling defendant's exception "E" to the conclusion of law of the referee as follows: "The referee erred in concluding as a matter of law that the plaintiff, H. D. Gurley, is entitled to recover the sum of $2,131.79, with interest on said sum at 8 per cent from 1 October, 1914, until paid, subject to credit of $459.12 to be entered as of the date of 18 May, 1916, together with $22.70 court costs, with interest on $22.70 from 7 July, 1916. That the above-named credit of $459.12 is the actual book value of the twenty-four shares of stock as set out in the contract of 21 April, 1916, as shown by the books and records of said bank on 18 May, 1916."

(5) The court erred in overruling defendant's exception "F" to the referee's conclusion of law as follows: "The referee should have found that the defendant was entitled to recover of the plaintiff for twenty-four shares of stock at $125.03 per share, less the amount of the note, to wit, $2,131.79."

Dillard & Hill for plaintiff.
M. W. Bell for defendant.

ALLEN, J. The learned counsel for the defendant has been diligent to preserve his right to a trial by jury, and we would be inclined to reward his efforts in that behalf if the facts, about which there is no controversy, were not determinative of the rights of the parties.

It appears, however, that the counterclaim of the defendant is based on substantially the same facts alleged in his complaint in the action brought in Buncombe County, and is within the scope and terms of the compromise and settlement of 21 April, 1916, and, therefore, cannot again be inquired into in the absence of an allegation of fraud or mistake, and, with the counterclaim eliminated, the controversy is reduced to the single question of the amount of the credit to which the defendant is entitled on account of the shares of stock in the North Georgia Bank, there being no evidence of any damage to the defendant or depreciation of the stock because the plaintiff did not attend the meeting of the stockholders of 18 May, 1916, at which the defendant was present and voted for a sale of the assets, which showed the stock to be worthless. And the credit by reason of the stock depends on the construction of the contract or agreement of 21 April, 1916, and on the effect to be given to the notice of assessment by the controller of the currency.

The parties have contracted as to the means of ascertaining the value of the stock on 18 May, 1916, and the question presented is not the actual or market value on that date, but what was the value measured

by the contract, which provides that the credit shall be "the actual book value of the said shares of stock as shown by the records and books of said bank."

The meaning of "book value of stock" is well understood and is ascertained by deducting from the assets carried on the books the liabilities and other matters required to be deducted (*People v. Coleman,* 107 N. Y., 541; *Cobble v. Cobble,* 97 N. Y. Supp., 773), and if the contract stopped here, there would be good reason in support of the defendant's contention that he is entitled to a credit of $125 per share, but it goes further and says it is the book value "as shown by the records and books of said bank."

Why this addition to a term having a definite meaning in the commercial world if no modification was intended, and why are the records of the bank specially mentioned? The reason is obvious. Sixteen days before the contract was signed the controller of the currency had given notice to the directors of an impairment of the capital of the bank, stating in detail the losses, amounting to $31,259.31, which were carried on the books as assets; and he also notified the directors that an assessment must be made on the stockholders to make good the loss or the bank must go into liquidation, and a meeting of the stockholders had been accordingly called for 18 May, 1916.

This notice of impairment of the capital and of the assessment was on file in the bank, and the defendant testified "it was among the records of the bank." The plaintiff and defendant knew of its existence because they refer to the notice of assessment and the meeting of the stockholders of 18th May in the contract, and as said in *Thomas v. Gilbert,* Anno. Cases, 1912 A, 519, of the action of the controller in reference to another bank, "The decision of the controller of the currency, as to the impairment of the capital stock of the Moscow Bank, was conclusive and final on the stockholders and the courts (*Aldrich v. Yates,* 95 Fed., 80; *Kennedy v. Gibson,* 8 Wall., 505, 19 U. S. (L. Ed.), 476; *Casey v. Galli,* 94 U. S., 677, 24 U. S. (L. Ed.), 168) and it left no alternative to the bank but to make up the deficiency or go into liquidation."

We have, then, at the time the contract was made the notice on file, which was binding on the stockholders and the courts and which the defendant regarded as a part of the records of the bank, and it was present in the minds of the parties because it is referred to, and it is but reasonable to conclude that they were contracting with reference to it, and for this reason the book value was to be ascertained from the books and records, and not from the books alone. If this is not true, the defendant is in the position of demanding and the plaintiff of agreeing to pay the book value of the stock when both knew that more than $31,000 of the assets carried on the books had been condemned and were

worthless, which is not to be believed of those in their right minds when there is no fraud or imposition.

The use of the word "actual" before "book value" is also significant. Webster defines "actual" as "real," and when used as it is in the contract, and considered in connection with the surrounding circumstances, it indicates clearly that the parties intended by "actual book value" the assets less liabilities carried on the books, with the items of assets condemned by the controller stricken out, and this is the opinion held by his Honor and embodied in his judgment.

We are, therefore, of opinion the notice of assessment by the controller must be considered as one of the records of the bank, and that the value of the stock on 18th May was the book value as modified by the notice, and, so holding, there is no reversible error on either appeal.

Affirmed on both appeals.

J. E. VAUGHT ET ALS. v. J. W. WILLIAMS ET ALS.

(Filed 3 January, 1919.)

1. Wills—Probate—Statutes—Copies—Deeds and Conveyances.

Under the provisions of ch. 393, Laws of 1885, now incorporated in sec. 3133 of the Revisal, it is not required that a will executed and admitted to probate in another State be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State.

2. Same—Subsequent Probate.

Where a deed to land has been executed by the executor under a power in the will prior to its proper probate, and thereafter the will is duly admitted to probate, this would relate back and authorize the execution of the deed.

3. Constitutional Law—Statutes—Wills—Probate—Executors and Administrators—Deeds and Conveyances.

Chapter 90, Laws of 1911, validating conveyances of land made prior to 1911 by nonresident executors acting under a power of sale contained in a will of a citizen of another State, etc., executed according to the laws of this State and duly proven and recorded in such other State, etc., and who had not given bond and obtained letters of administrations in this State prior to the execution of such deed, is within the constitutional authority of the Legislature, and valid.

4. Constitutional Law— Statutes— Executors and Administrators— Wills— Probate—Bonds.

The failure of a nonresident executor to give bond or to qualify under the will in North Carolina cannot vest any interest in lands situated here

in the heir at law, as such omission does not affect the validity of the will, but only the power to execute it here; and ch. 90, Laws of 1911, validating conveyances of lands in North Carolina by nonresident executors, under certain conditions, who have not qualified here or given the bond, is not unconstitutional as impairing a vested right.

5. **Executors and Administrators—Wills—Deeds and Conveyances—Seals—Heirs at Law—Equity.**

A deed to lands made by the executor, though not under seal, in pursuance of a power contained in the will, is enforcible in equity against the heir at law, especially when he is provided for in the will and is benefited by the conveyance.

6. **Pleadings—Deeds and Conveyances— Seals— Evidence —Record— Executors and Administrators—Wills.**

It is not necessary to allege a defect or mistake in deed not under seal, conveying land, when made by an executor under a power contained in the will to enforce it in equity against the heir at law, such fact appearing on the face of the record and its establishment dependent entirely on the documentary evidence.

7. **Executors and Administrators—Wills—Deeds and Conveyances—Seals—Equity—Contracts to Convey.**

A seal is unnecessary to an executor's deed made under a power in the will, to convey the equitable title, as against the heir at law, provided for in the will, and may be regarded as a contract to convey, wherein the seal is unimportant.

APPEAL by defendants from *Cline, J.*, at the June Special Term, 1918, of AVERY.

This is an action to recover a tract of land in Mitchell County, brought by the plaintiffs, who are the heirs of John L. Vaught, against the defendants, who are purchasers under a deed executed by the executrix of the said Vaught.

John L. Vaught died in Tennessee, of which State he was a resident, on 27 February, 1907, leaving a will in which he empowered and directed his executrix to sell said tract of land and to apply the proceeds to the payment of his debts and to make deeds to the purchasers. The executrix was a resident of Tennessee. The will was executed according to the laws of this State and was duly probated and recorded in Tennessee.

In June, 1907, it was probated and recorded in Mitchell County on an exemplification and certification by the clerk of the court in Tennessee, in which it was probated there, and again in 1910 it was probated and recorded in said county of Mitchell on the oath and examination of the subscribing witnesses.

In July, 1907, the executrix sold said land under the power in said will to those under whom the defendants claim, who paid the purchase money and received a deed from the executrix, which was duly regis-

tered. The executrix did not file bond or qualify in this State prior to the execution of the deed, and the deed was not under seal.

The plaintiffs objected to the introduction of the will recorded on the certificate of the clerk on the ground that the probate was invalid because it was not made and had on the oath and examination of the subscribing witnesses, and to its introduction in evidence on the second probate because this was after the deed was made. The objections were overruled and the plaintiffs excepted.

The plaintiffs also contended that the deed was void because the executrix had not filed a bond or qualified in this State before its execution, and also because it was not under seal. The court ruled against each of these contentions and the plaintiffs excepted.

Judgment was entered in favor of the defendants and the plaintiffs excepted and appealed.

Councill & Yount, F. A. Linney, J. W. Ragland, E. S. Coffey, and Bingham & Bingham for plaintiffs.

Lee F. Miller, W. C. Newland, S. J. Ervin, and Lowe & Lowe for defendants.

ALLEN, J. The first objection of the plaintiffs is to the admission in evidence of the will of John L. Vaught, under which the defendants claim, upon the ground that it was recorded in this State without authority of law, in that the clerk, ordering the will to record, failed to require the appearance and examination of the attesting witnesses, and they rely on *Hunter v. Kelly,* 92 N. C., 285, which seems to sustain this position.

It was held in that case that the will of a nonresident, probated and recorded in the State of the domicile, could not be admitted to probate in this State upon a certified copy by the clerk of the court where it had been probated, and that such will would not be admitted in evidence unless reprobated in this State by an examination of the witnesses in person or on commission; but the decision was made at February Term, 1885, on a construction of section 2155 of the Code of 1883, now Revisal, sec. 3131, and at a time when the succeeding section 2156, now Revisal, 3133, which is peculiarly applicable to nonresidents, did not contain the provision, which was supplied by chapter 393, Laws of 1885, and is incorporated in Revisal, sec. 3133, that whenever the will of a nonresident is duly proved and allowed in the State of the domicile "a copy or exemplification of such will duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States," shall be allowed, filed, and recorded, etc.

The fact that the will was executed according to the laws of this State, another requirement of the statute, appears from the will and the proofs.

It is highly probable that the omission in the statute as to the probate of the wills of nonresidents, pointed out in *Hunter v. Kelly,* which was decided 9 March, 1885, was called to the attention of some member of the General Assembly, then in session, and that as a result and to cure the defect the act of 1885, ratified 11 March, 1885, was enacted. We are, therefore, of opinion the will, being recorded on the certification of a clerk after the amendatory act, was properly admitted in evidence. But if the objection made by the plaintiffs was valid, and a reëxamination of the witnesses in this State was necessary, the record shows that the witnesses did appear before the clerk of Mitchell, and that the will was again probated and ordered recorded on their examination in 1910, and this would relate back and would authorize the execution of the deed by the executrix prior thereto. *Scott v. L. Co.,* 144 N. C., 45.

The plaintiffs further contend that if the will was properly admitted in evidence, it furnishes no authority to make the sale of the land, or to execute the deed pursuant thereto, on account of the failure of the executrix to file the bond required by subsection 1 of section 28 of the Revisal, or to qualify in this State, and the case of *Glascock v. Gray,* 148 N. C., 348, decided after the sale, so holds; but the defendants seek to avoid the effect of that decision by relying on the curatice act of 1911, ch. 90, which is as follows: "That subsection 1 of section 28 of the Revisal of 1905 be and the same is hereby amended by adding at the end of said subsection the following words: *'Provided further,* that if any nonresident executor, acting under a power of sale contained in the last will and testament of a citizen and resident of another State or foreign country, executed according to the laws of this State and duly proven and recorded in the State or foreign country wherein the testator and his family and said executor resided, and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to January 1, 1911, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor had given bond and obtained letters of administration in this State prior to the execution of such deed.'"

The question, therefore, presented on this branch of the appeal is as to the power of the General Assembly to pass the act, and as to its effect on the plaintiffs, who are heirs of the testator. Mr. Cooley says in his work on Constitutional Limitations (7th Ed.), 531: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists of doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by

prior law, it is equally competent to make the same immaterial by a subsequent law."

"In general, statutes curing defects in acts done or authorizing the exercise of powers which act restrospectively are valid, provided the Legislature originally had authority to confer the powers or authorize the acts. The Legislature may legalize conveyances made by executors, administrators, guardians, or other persons in similar positions of trust, which are irregular because of some omission or lack of power on the part of such trustee." 8 Cyc., 1023.

This principle has been fully recognized in this State, and acts validating probates and curing defects in other instruments which would have made them inoperative have, as between the parties, been frequently sustained. *Tatom v. White,* 95 N. C., 458; *Gordon v. Collett,* 107 N. C., 363; *Barrett v. Barrett,* 120 N. C., 129, and other cases, 6 R. C. L., 321.

Speaking of certain curative acts, then under consideration, *Justice Walker* says, in *Weston v. Lumber Co.,* 160 N. C., 268: "The statutes are highly remedial and should be liberally construed, so as to embrace all cases fairly within their scope. It is constructive legislation; we are saving titles, and not destroying them. It has been said that 'such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.' *McFaddin v. Evans Co.,* 185 U. S., 505. It was further held that to validate defective probates and registrations is a proper exercise of legislative power and favored by the courts."

What, then, is the effect of the act on the heirs, who claim that they have vested interests which cannot be disturbed by subsequent legislation, and in what does this vested interest consist?

The failure of the executrix to file the bond or to qualify did not affect the validity of the will, but simply withdrew the power to execute its provisions, and the heir therefore had no interest in the land, because there was a will, executed and probated according to law, and the claim of the heir cannot arise except upon the death of the ancestor intestate. The right, then, of the heirs, if any exists, is in the continuance in force of the statute requiring the bond to be filed and the qualification of the executrix, which operated as a prohibition on the executrix to perform the duties imposed by the will, and this is not within the protection of the principle which forbids the divesting of vested rights.

In the matter of the estate of Patterson (132 A. S. R., 126) the Supreme Court of California had a similar question under consideration, and said: "The testatrix, Mrs. Patterson, had exercised her testamentary power by a duly executed will, which would take effect upon her death, but which could not be admitted in evidence against the heirs

until after it was probated. In her lifetime, but without her knowledge, it was destroyed in a public calamity. Because of its destruction in her lifetime, the probate court, under the law as it existed at her death, could not allow it to be probated because there could be no legal proof of it. After her death the Legislature removed this impediment by making wills destroyed in a public calamity provable. The heirs had no vested right to have this law forbidding the probate of such wills continued in force. Their right to the estate of the ancestor was given by statute, and it was contingent upon the fact of there being no will in existence which could be proved."

A case with the facts much stronger in favor of the heir than in this is *Watson v. Mercer,* 8 Pet., 88, which is approved in *West Side Belt. R. Co. v. Pittsburg Construction Co.,* 219 U. S., 92, and the facts and decision summarized as follows: "In *Watson v. Mercer,* 8 Pet., 88 (8 L. Ed., 876), such an act was sustained against a charge that it divested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the Supreme Court of the State against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated."

"The heirs have no vested right in having any law relating to a pending probate continued in force." 6 R. C. L., 315.

A case very much in point, and by fair inference completely so in principle, is *Vanderbilt v. Johnson,* 141 N. C., 370. In that case the plaintiff relied on the will of John Strother, a resident of Tennessee, as a part of his title. The will was executed in accordance with the laws of this State, but the probate was not taken as required by our statutes, and this appeared on the face of the record of the will in this State.

Long afterwards the General Assembly passed an act curing the defect and validating the probate in this State. The act was sustained, The Court saying in the course of the opinion, "The defendants do not claim under a deed executed by the heirs at law of John Strother before the passage of the act, and therefore no vested right intervenes." We therefore hold that the act of 1911 is a valid exercise of legislative

authority, and that it is operative against the plaintiffs, the heirs of the testator.

The remaining question is as to the effect on the title of the defendants of the failure of the executrix to affix a seal to her deed. It has been held in *Patterson v. Galliher,* 122 N. C., 512, and in other cases that a paper-writing not under seal will not pass the legal and equitable title to land, but the instrument signed and delivered by the executrix was in execution of a power conferred by the will of the testator, and, as said by *Lord Alvanley* in *Chapman v. Gibson,* 21 Eng. Rul. Cas., 390: "Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir to make him perfect this intention. This is an intelligible principle. Very early, where the testator showed an intention to provide for debts, this Court would supply the defect against the heir."

"Equity will afford its aid where there has been a defective execution by a formal or appropriate instrument; thus if the instrument, whether it be a deed or will, is by the power required to be executed in the presence of a certain number of witnesses, and it is executed in the presence of a small number, or if it is required to be signed and sealed, and sealing is omitted, equity will supply the defect. *Wade v. Paget,* 1 Bro. C. C., 363; *Cockerell v. Cholmeley,* 1 Russ. & My., 424; 1 C. & F., 60." *Tollett v. Tollett;* White & Tudor Lead. Cases in Eq., 372. . . .

"If a power is required to be executed in the presence of three witnesses and it is executed in the presence of two only, equity will interfere in such a case. So if the instrument, whether it be a deed or will, is required to be signed and sealed and it is without seal or signature, equity will relieve." Story Eq. Jur., 186.

Mr. Bispham, in his Principles of Equity, p. 329 *et seq.,* states the doctrine as follows: "The occasion which call for the interposition of equity on the ground of mistake are, of course, very numerous, and it would not be possible, even if it were desirable, to enumerate them all without in fact giving a digest of the reported decisions under this head. There is, however, one class of cases in which the equitable doctrine is of an anomalous character and requires particular notice, and that is the defective execution of powers." . . .

"Equity will not interfere in the case of a nonexecution of a power. It will correct defects in an attempted execution; but it will not supply an execution if none has been attempted." . . .

"The defects which will be aided in equity are of two kinds: first, where there has been an instrument executed from which an intention to exercise the power may be inferred, but the instrument itself is in-

formal or inappropriate; and, second, where there has been a defective execution of a formal and appropriate instrument." . . .

"Of the second class of defects which will be sided in equity, familiar instances are found in those cases in which the instrument by which the power is to be exercised is required to be executed in the presence of a certain number of witnesses, and is actually executed in the presence of a smaller number, or in which it is required to be signed and sealed and sealing is omitted." . . .

"It may be stated, as a general rule, that mere volunteers will not be assisted, but that aid will be given to purchasers for value, mortgagees, lessees (for mortgagees and lessees are purchasers *pro tanto*), creditors and persons who have a meritorious standing." . . .

"In the third place, equity will aid the defective execution of a power against a remainderman and also, in general, against the heir-at-law. Whether it will be aided as against an heir-at-law who is unprovided for seems to be still undecided."

The doubt expressed as to the administration of the equity against an heir unprovided for arose from the differences of opinion between *Lord Alvanley* in *Chapman v. Gibson,* 3 Bro. C. C., 229, and *Lord Rosslyn* in *Hills v. Dawnton,* 5 Ves., 557, but both agreed that in any event the heir must be totally unprovided for, and that the courts would not inquire into the *quantum* of the provision; and it appears in this record that the testator left lands in Tennessee undevised, and for the benefit of the heirs, worth approximately $20,000. Nor is it necessary that there should be an allegation of the defect or mistake and a prayer for correction when it appears on the face of the record and is dependent entirely on documentary evidence, as in this case. *Geer v. Geer,* 109 N. C., 679; *Westfeldt v. Adams,* 131 N. C., 379; *S. c.,* 135 N. C., 592.

The Court says in *Geer v. Geer,* and this is approved in the other cases: "It has been fully settled that a plaintiff may recover in ejectment upon an equitable title (*Taylor v. Eatman,* 92 N. C., 601; *Murray v. Blackledge,* 71 N. C., 492; *Condry v. Cheshire,* 88 N. C., 375); and where, upon the face of record evidence, like that before us, the court would in a direct proceeding, as a matter of course, order the correction of a merely formal defect in the execution of its decree, it is unnecessary (though perhaps the better practice) to set forth the facts in the pleading. The same is true where it appears from the documentary evidence that the dry legal title only is outstanding in another; but where it is necessary to establish such equitable ownership by extrinsic testimony, then the facts should be pleaded."

These authorities also establish the right to recover land upon an equitable title, and if the paper signed by the executrix is not a deed because not under seal it would be upheld as a contract to convey which

need not be sealed (*Mitchell v. Bridgers,* 113 N. C., 63); and as those under whom the defendants claim have paid all of the purchase money, they would be the owners in equity, which interest, if sufficient to sustain an action as plaintiffs, would be equally effective as a defense to prevent a recovery. See *Tunstall v. Cobb,* 109 N. C., 316, in which a paper not under seal, relied on as a release, was treated as a contract to convey, and *Flowe v. Hartwick,* 167 N. C., 452, in which the same effect was given to an undelivered paper in form a deed.

We have considered the legal questions presented, and are of opinion the judgment must be affirmed, and this conclusion seems to be according to the right and justice of the case.

The testator bought the land in controversy in October, 1905, for $7,000, and a part of the purchase money was unpaid at his death. He directed in his will that this land be sold for the payment of his debts, and in July, 1907, within two years from his purchase, his executrix sold the land for $15,500 and applied the proceeds to the payment of debts in exoneration of undevised lands in Tennessee of the value approximately of $20,000, which descended to the plaintiffs, his heirs.

Affirmed.

J. C. EGGERS v. IRA STANSBURY.

(Filed 11 December, 1918.)

Appeal and Error—Reference—Exceptions—Evidence.

There must be an exception to the insufficiency of the evidence to support the referee's findings of fact for such findings to be considered in the Supreme Court on appeal; and where in an action to recover lands the referee has found sufficient adverse possession to ripen the title in the appellee, and has also found that the disputed location of the *locus in quo* was covered by his paper title, either finding, where the sufficiency of the evidence is not excepted to, will sustain the judgment rendered adversely to the appellant when otherwise there is no error urged or found.

APPEAL by defendant from *Cline, J.,* at the Fall Term, 1918, of WATAUGA.

This is an action to recover about five acres of land, the controversy evidently having arisen on account of the draftsman of the plaintiff's deed having copied one line in an old deed 50 poles, instead of 55 poles.

The matters in issue were by consent sent to a referee for trial, and were heard in the Superior Court upon exceptions to the report, and the court, among other things, found the following facts:

"7. That the plaintiff and his father, Ransom Eggers, under whom

he claims, have been in open, notorious and continuous possession of the land embraced in the calls last above set forth and under Ransom Eggers' color of title deed for forty years prior to the beginning of this action.

"8. That the proper location of the boundaries in the deed from Ransom Eggers to John C. Eggers (using again the court map) runs from A to B, C, D, E by the birch or mahogany stump to the ironwood at G, and then northward, following the outside of the old fence, to X, the poplar stump; thence northwest about 37 poles, where the line calls for 34 poles, to the point 7, where the court finds the hickory to be on the ridge called for in both deeds; then following the dotted line south 45 west 71 or 72 poles to a sugar tree; thence southeast across 80 poles to a water oak, spoken of in the deeds as Spanish oak; thence southeast to the beginning at A."

There was a judgment in favor of the plaintiff, and the defendant appealed.

E. F. Lovill, W. R. Lovill, and John E. Brown for plaintiff.
F. A. Linney, John H. Bingham, and Edmund Jones for defendant.

ALLEN, J. The findings of fact by the court are conclusive upon us, in the absence of an exception that there is no evidence to support them (*Matthews v. Fry,* 143 N. C., 384), and no such exception has been taken to the two findings set out, either one of which establishes the title of the plaintiff and is sufficient to support the judgment, as finding 7 shows an adverse possession in the plaintiff and those under whom he claims for more than forty years, and finding 8 establishes the boundaries of the plaintiff's deed according to his contention, which was the real question in controversy.

Affirmed.

SOUTHERN RAILWAY COMPANY v. CHEROKEE COUNTY.

(Filed 3 January, 1919.)

1. Constitutional Law—Statutes—Courts.

In construing an act of the Legislature with regard to ascertaining whether or not it is in conformity with the State Constitution, the purpose of the courts is to sustain its validity if it can reasonably be done; but where there is an irreconcilable conflict, it is the duty of the Court, under its oath, to sustain the Constitution, not the will of the legislators, who are but agents of the people.

2. Taxation— Constitutional Law— Statutes— Limitation— General Laws— Special Laws.

Under the provisions of our Constitution, act 5, sec. 1, it is commanded that the poll tax shall always be equal to that on $300 valuation on property, and that it shall not exceed $2 upon the poll, and a statute which authorizes any county to levy a tax in excess of this constitutional limitation for general expenses, though called a "special" tax in the act, is unconstitutional and invalid.

3. Same—Schools.

Section 9, ch. 33, Laws of 1913, being a part of an act "to provide for a six-months school term in every public school district of the State," but authorizing a tax in every county in the State for ordinary expenses, without enumerating them, is coextensive with the legislative power, as to the territory, people or property to be taxed, and the purpose is general, and not a special one, within the meaning of act 5, sec. 1 thereof.

4. Constitutional Law—Taxation—Statutes—Ratification.

Chapter 88, Laws of 1913, permitting the levy of a tax for the years 1913 and 1914, does not purport to authorize a levy of a tax in 1915 for school purposes in excess of the constitutional equation between the poll and the property tax (act 5, sec. 1), or a special levy for school purposes (act 5, sec. 6), and if otherwise, it would fall within the same condemnation as sec. 9, ch. 33, Laws of 1913, and ch. 109, Laws of 1917, cannot validate the levy of 1915 by ratifying ch. 33, Laws of 1913, because the Legislature had not the original authority to enact it.

5. Taxation—Payment—Protest—Statutes—Actions—Demand.

Where a taxpayer has paid his taxes authorized by an unconstitutional statute, under protest, and has complied with the provisions of Revisal, sec. 2855, which regulates and controls actions to recover illegal taxes paid under protest, it is unnecessary to the maintenance of his action to recover them that he follow the provisions of sec. 1384, requiring that he present his claim and make his demand, etc.

WALKER, J., concurs in result; CLARK, C. J., dissenting.

ACTION to recover the amount of certain taxes paid by the plaintiff, under protest, upon the ground that they were illegally levied and collected.

There was a judgment in favor of the plaintiff, and the defendant excepted and appealed.

A. B. Andrews and Dillard & Hill for plaintiff.
J. S. Manning, Frank Nash, and J. D. Mallonee for defendant.

ALLEN, J. In the year 1915 the county of Cherokee levied and collected a tax of 2⅔ cents in excess of 66⅔ cents on property of the value of $100. The plaintiff paid this tax on its property under protest, and this action is brought to recover the amount so paid. The tax was not for schools, but was levied "for the purpose of taking up a note in

bank made by the predecessor board and other current expenses" under the authority of ch. 33, sec. 9, Laws of 1913, which is as follows:

"SEC. 9. That the board of commissioners of any county in North Carolina be and they are hereby authorized and empowered to levy a special tax in excess of the constitutional limitation, not exceeding five (5) cents on the one hundred dollars ($100) valuation of all property listed for taxation in their respective counties, to provide for any deficiency in the necessary expenses and revenue of said respective counties which may be caused by the provisions of this act."

These facts are found by his Honor and are not controverted by the defendant, and they necessitate an inquiry into the constitutionality of the act of the General Assembly.

The text-writers and the decided cases agree that it is not only within the power, but that it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.

The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

The principle is well stated in 6 Ruling Case Law, 72, that "Since the Constitution is intended for the observance of the judiciary as well as the other departments of government, and the judges are sworn to support its provisions, the courts are not at liberty to overlook or disregard its commands, and, therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shrink without violating their oaths of office. The duty, therefore, to declare the law unconstitutional in a proper case cannot be declined, and must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question."

The first exercise of this power in this State was in 1787, in *Bayard v. Singleton,* 1 N. C., 42, and one of the latest was in 1912, in *Comrs. v. Webb,* 160 N. C., 594, in which an act was held unconstitutional by the unanimous opinion of the Court, written by the present *Chief Justice.*

In *Sutton v. Phillips,* 116 N. C., 504, in an opinion written by *Chief Justice Clark,* the Court says: "While the courts have the power, and it is their duty in proper cases, to declare an act of the Legislature un-

constitutional, it is a well-recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case"; and this language was approved and affirmed in the case of *In re Watson,* 157 N. C., 349.

In 1913 an act of the General Assembly was declared to be unconstitutional in *Asbury v. Albemarle,* 162 N. C., 248, and in *Sewerage Co. v. Monroe,* 162 N. C., 275, and between these cases, running from the first volume of our Reports to the 162d, covering a period of one hundred and twenty-five years, there could be cited fifty or more cases in which acts of the General Assembly have been declared unconstitutional, and we find no judicial opinion to the contrary.

De Tocqueville, the eminent French philosopher, speaking of our Constitution and of the powers of the courts, says in Democracy in America, p. 98 *et seq.:* "An American Constitution is not supposed to be immutable, as in France, nor is it susceptible of modification by the ordinary powers of society, as in England. It constitutes a detached whole, which, as it represents the determination of the whole people, is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. In America the Constitution may, therefore, vary; but as long as it exists it is the origin of all authority and the sole vehicle of the predominating force. . . . In the United States the Constitution governs the legislator as much as the private citizen; as it is the first of laws it cannot be modified by a law, and it is therefore just that the tribunals should obey the Constitution in preference to any law. This condition is essential to the power of the judicature, for to select that legal obligation by which he is most strictly bound is the natural right of every magistrate. . . . I am inclined to believe this practice of the American courts to be at once the most favorable to liberty as well as to public order."

We must then examine the sections of the Constitution relating to taxation for the purpose of seeing if the General Assembly has transcended the limitations on its powers to be found in that instrument. Art. V, sec. 1, is as follows: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

This section establishes the equation between property and the poll

and limits the power to levy State and county taxes on property to $2 on property of the value of $300, or 66⅔ on $100.

"It is too plain to admit of argument that the intent of this section was to establish an invariable proportion between the poll tax and the property tax, and that as the former is limited to $2 on the poll, so is the latter to $2 on the $300 valuation of property." This was said by *Rodman, J.,* a member of the convention which framed the Constitution, in *R. R. v. Holden,* 63 N. C., 427.

This section commands two things:

"1. That the poll tax shall always be equal to that on $300 valuation of property. This has been called the equation of taxation.

"2. That the State and county poll tax shall not exceed $2. This fixes the limit of taxation on polls, and consequently on property.

"These two directions are equally definite and positive; they are in no wise inconsistent with each other; it is impossible that one has any more favor or sanctity than the other merely because it comes earlier or later in the sentence; they must be equally binding on the Legislature." *Rodman, J.,* in *Winslow v. Weith,* 66 N. C., 432.

"It is well settled that, for the ordinary expenses of government, both State and county, the first section of Article V of the Constitution places the limit of taxation and preserves the equation between the capitation and the property tax—the capitation tax never to exceed $2 and the tax upon property valued at $300 to be confined within the same limit." *Board of Education v. Comrs.,* 111 N. C., 580.

"The taxes which the commissioners are empowered to levy have their limitations in the Constitution, and these cannot be exceeded 'except for a special purpose and with the special approval of the General Assembly.' Const., Art. V, secs. 1 and 6. The construction of these clauses has been fixed by a series of decisions, from one of which (*French v. Comrs.,* 74 N. C., 692) we extract the emphatic declaration of *Bynum, J.*: 'It admits of no dispute now that taxation for State and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and *new debts.' Trull v. Comrs.,* 72 N. C., 388; *Clifton v. Wynne,* 80 N. C., 145; *Mauney v. Comrs., supra.*" *Cromartie v. Comrs.,* 87 N. C., 139.

These authorities establish beyond controversy that the tax is illegal, under section 1 of Article V, because it exceeds the limitation on State and county taxes, and the defendant, if it has any standing in court, must rely on section 6 of Article V, which permits the county commissioners to exceed the constitutional limitation in section 1 "for a special purpose and with the special approval of the General Assembly."

These two sections must be considered and read together with the purpose in view of giving effect to both, and a construction must be

avoided which will make one destructive of the other, which would be the result if the commissioners could exceed the constitutional limitation under authority of section 6 for general purposes, and under general laws, because under such a construction the General Assembly could levy a State tax up to the limitation under section 1, and then pass a general law under section 6 allowing the counties to levy the same tax for county expenses.

The first section "was inserted in the Constitution of 1868 as a guarantee to the property holders of the State that they would not be oppressed by inordinate taxes laid by representatives elected by the newly enfranchised blacks, who had small property to be taxed and whose representatives might otherwise be tempted to levy excessive taxes on property (*Rodman, J.*, 63 N. C., at p. 427), and for nearly thirty years since this breakwater was put into the Constitution it has never been lost sight of" (*Clark, J.*, in *Russell v. Ayer,* 120 N. C., 191), and section 6 for the purpose of providing for an emergency that could not be reasonably anticipated, and as a safeguard against increasing taxation hastily and without due consideration, and to furnish publicity, a special act stating the special purpose is required.

Does section 9 of chapter 33 of the Laws of 1913 come within the classification of special laws, and is a tax for current expenses of a county a special purpose? It is a part of an act "to provide for a six-months school term in every public school district of the State," and the section authorizes a tax in every county in the State for ordinary expenses, without enumerating them, thus making it coextensive with legislative power, so far as territory or the people or property to be affected are concerned, and the purpose is general.

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things as a class is a special one. *Ewing v. Hoblitzelle,* 85 Mo., 64, 78; *Schmalz v. Wooley,* 56 N. J. Eq., 649; *In re New York Elevated R. Co.* (N. Y.), 3 Abb. N. C., 401, 417, 422; *Gay v. Thomas,* 5 Okla., 1; *Clark v. Finley,* 93 Tex., 171; *Hamman v. Central Coal and Coke Co.,* 156 Mo., 232; *State ex rel. Harris v. Herrmann,* 75 Mo., 340, 346; *Lynch v. Murphy,* 119 Mo., 163; *Sawyer v. Dooley,* 21 Nev., 390; *Herbert v. Baltimore County Comrs.,* 97 Md., 639.

"Special laws are those made for individual cases, or for less than a class requiring laws to its peculiar conditions and circumstances. *Vermont Loan and Trust Co. v. Whithed,* 2 N. D., 82; *Guthrie Daily Leader v. Cameron,* 3 Okla., 677; *Maxwell v. Tillamook County,* 20 Ore., 495 (quoting *Healey v. Dudley* (N. Y.), 5 Lans., 115; Suth. St. Const., par. 127); *Groves v. Grant County Court,* 42 W. Va., 587 (citing 1 Bl. Com., 196).

"A special statute is one operating upon one, or a portion of a class, instead of upon all of a class. *S. v. Irwin,* 5 Nev., 111, 120.

" 'Local or special legislation,' according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation and that relating to classes of persons or subjects. *Stone v. Wilson* (Ky.), 39 S. W., 49, 50.

" 'Private or special statutes,' says Sedgwick in his work on Statutory and Constitutional Law, 'relate to certain individuals or particular classes of men.' In Smith on Constitutional Construction it is said: 'The distinction between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but special or private acts are rather exceptions than rules, being those which operate upon private persons and concerns.' Page 917, par. 802; *People v. Wright,* 70 Ill., 388, 298.

"Whether or not an act of the Legislature is special or general, within a constitutional provision, is not to be determined by the form of the act, but by what in the ordinary course of things must necessarily be its operation and effect. If this operation and effect must necessarily be special, the act is special, whatever may be its form; but if, on the other hand, the act has room within its terms to operate on all of a class, present and prospective, and not merely on one particular thing, or on a particular class of things, existing at the time of its passage, the act is general. *City of Topeka v. Gillett,* 32 Kan., 431; *S. v. Hunter,* 38 Kan., 578." Words and Phrases, V. 7, 6577 *et seq.*

There are two cases in our own Reports which seem to be decisive of the whole question. The first is *Williams v. Comrs.,* 119 N. C., 520, approved in *Herring v. Dixon,* 122 N. C., 423, in which it was held that a statute authorizing a special county tax for the purpose of maintaining public ferries, building roads, and meeting other *current expenses* was not for a "special purpose" within the meaning of section 6 of Article V of the Constitution, and that a tax levied thereunder in excess of the constitutional limitation of section 1 was void; and the second, *Bennett v. Comrs.,* 173 N. C., 629, which says that a statute "conferring on county commissioners the power to borrow money for the necessary expenses of the county and provide for its payment" "neither is, nor does it purport to be, a 'special act and for a special purpose' within the meaning of the constitutional provision."

We are, therefore, of opinion the tax has not been levied under a special act or for a special purpose, and this seems to have been the opinion of the General Assembly of 1917 and of those in charge of the educational interests of the State, as otherwise there was no necessity for submitting to a vote the constitutional amendment providing for a

six-months school term. Why take the trouble to amend the Constitution, and why run the risk of a vote of disapproval, if it was within the power of the General Assembly to increase the State tax for schools and to authorize the counties to levy taxes in excess of the constitutional limitation for ordinary and necessary expenses; and this is what the act of 1913 purports to do.

Another act of 1913 (chapter 88) has been referred to in the argument, but it only permits the levy of a tax for the years 1913 and 1914, and the time for acting thereunder had expired when the tax of 1915, which is in controversy in this action, was levied; nor did the commissioners of Cherokee purport to act under chapter 88. The amendatory act of 1917 (chapter 109) is also ineffective to validate the tax levy of 1915. In the first section it amends chapter 88, Laws of 1913, by making the tax for current expenses of the county in excess of the constitutional limitation an annual tax, and would fall under the same condemnation as section 9 of chapter 33, Laws of 1913, and in the second section it undertakes to ratify levies for 1915 and 1916, but the General Assembly cannot ratify an act which it could not authorize originally.

The defendant further contends that this action cannot be maintained, although the tax is illegal, because of the failure to present the claim and make demand as required by section 1384 of the Revisal, but the plaintiff has followed and complied with section 2855 of the Revisal, which regulates and controls actions brought to recover illegal taxes paid under protest.

Affirmed.

WALKER, J., concurring in result: I agree fully with the Court in its opinion, as delivered by *Justice Allen,* that the tax provided for in the statute is for a general and not a special purpose, and therefore is not authorized by the Constitution under Art. V, secs. 1 and 6. But I do not agree that section 6 permits a tax exceeding the constitutional limit as fixed by section 1. It was intended to establish the proportion between State and county taxation, providing, and providing only, that the latter shall not exceed the double of the former except for a special purpose and with special approval of the General Assembly. There is nothing said about exceeding the limit of taxation, and no distinction is made in section 1 or section 6 between ordinary and extraordinary expenses. The language is: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash (clause as to exemptions omitted), and the State and county capitation tax combined shall *never* exceed two dollars on the head." (*Italics ours.*)

I will not repeat here what was said by me in *Collie v. Comrs.*, 145 N. C., at p. 177, and later in *Moose v. Comrs.*, 172 N. C., 451. We are not permitted to construe the Constitution by a consideration of subsequent conditions and circumstances, and if the growth and development of the State, since it was adopted, has made necessary a higher limit, the remedy is not in interpretation, but by amendment as provided in the instrument itself. For some time after its adoption, there was plenty of room within the limit it prescribed for the counties to more than double the State tax; but however this may have been, we must ascertain the meaning of the Constitution by considering only its language. These principles are so very elementary as not to require further discussion or the citation of authority. I considered this question fully in the cases cited above and will not go over the argument again.

I agree with the statement in the opinion that this Court has the power to declare a statute invalid as being in conflict with the Constitution. To be more accurate, it is not that the statute conflicts with the Constitution, but that the Legislature has exceeded its power as fixed by it, and to the extent that it has done so the legislation is unwarranted, and therefore invalid. Whether in any particular case the Legislature was without authority under the Constitution to act is so plainly and palpably a question of law that it would be more than idle or vain to demonstrate it. It is really not now an arguable question. Standard text-writers, commentators and publicists, and also the largest majority of the courts and jurists, agree that this question has been set at rest by a long line of cases in the Federal and State jurisdictions, which have virtually closed the door to all discussion. If any Court in the Union has been thoroughly and irrevocably committed to this doctrine, it is this Court. If it was not the first, it was certainly among the first to announce it as a clear and unquestioned principle in constitutional law. The Legislature has no more right to act beyond the scope of its power, as limited by the Constitution, than this Court has to exceed the jurisdiction allotted to it in the distribution of governmental powers made by that instrument to the three coördinate departments—that is, legislative, executive, and judicial—and when it attempts to do so, all that it does beyond that limit is just as void as would be a judgment of this or any other Court rendered in excess of its jurisdiction.

The legislative power not granted in the Constitution, expressly or by clear implication, was retained by the people, to be exercised or delegated as they may see fit. The people did not exhaust all of their sovereign power when they framed the Constitution, but there was a large residue still retained by them. The Legislature is not, therefore, a sovereign body with plenary powers, but within the proper and prescribed limit, as set by the Constitution, it is entitled to have—and so far as this Court is concerned will have—perfect freedom of action.

Among the powers denied to it is the one now being considered; that is, the power to levy taxes beyond the limit fixed by the Constitution in Article V, sections 1 and 6.

It is strangely claimed by some that it has unlimited right to decide for itself, and finally, whether it has a given power, and if this be so, it would manifestly result that the Constitution, instead of being a charter of fundamental principles and policy, would have no more binding force and effect than a statute, as it could be repealed or set at naught, according as the Legislature might will, meaning one thing today and another thing at some day in the future, or nothing at all, as partisan whim or caprice might determine. Such a doctrine is wholly inadmissible and is entirely at variance with every proper conception and notion of constitutional government. It has been so held by nearly all, if not all, of the American courts. As early as 1780 the Supreme Court of New Jersey, in *Holmes v. Walton,* Amer. His. (Vol. 4), 456, laid down this doctrine, and that case was followed in New York by *Rutgers v. Waddington,* Fiske Cr. Period, Am. His., p. 127, decided in 1784, and in this State by *Bayard v. Singleton,* 1 N. C., 42, cited in the opinion of the Court.

The same Constitution that created the Legislature and gave it the power to legislate also created this Court, and expressly prescribed its jurisdiction, giving it final, appellate jurisdiction of matters of law and legal inference. Art. IV, sec. 8. And this brings us to consider the conclusive argument of the illustrious *Chief Justice Marshall* in *Marbury v. Madison,* 1 Craud (U. S.), 137, who said, when speaking for the Court: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution—if both the law and the Constitution apply to a particular case, so that the courts must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the courts must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply." That case has been approved and its doctrine fully accepted and followed by practically all the courts and text-writers.

This comports with the language of our Constitution, which requires us to decide upon "all questions of law or legal inference." We must needs first determine what the law is before we can pass upon it or apply it to individual cases or controversies, and in discharging this

important duty, or in exercising our jurisdiction, we must necessarily decide, when the validity of a statute is challenged or brought into controversy, whether it is valid or not, just as we would do if a judgment of a court of this or any other State is attacked for want of the necessary power or jurisdiction to render it; we must say whether it is valid or not.

Let me quote the impressive words of another great constitutional lawyer, *Judge Cooley,* in his standard work on Constitutional Limitations. He said at p. 228: "The courts sit not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the Legislature has failed to keep within the constitutional limits that they are at liberty to disregard its action; and in doing so they only do what every private citizen may do in respect to the mandates when the judges assume to act and to render judgment or decrees without jurisdiction. In exercising this high authority the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the Legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."

To the same effect is the Federalist (Dawson's Ed.), No. 78: "There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor or commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that mere men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid." And *Judge Dicey* observes that it is now considered not only the right but the duty of every judge in the United States to treat as void any enactment which violates the Constitution, and *Judge Cooley* adds that it is now generally agreed that the courts cannot properly decline to overrule the acts of the Legislature when it has exceeded the authority set by the Constitution to its limits. Dicey's Law of the Constitution (2d Ed.), 125.

As early as 1795, *Justice Patterson* of the United States Supreme Court said: "I take it to be a clear position that if a legislative act impugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that in such a case it will be the duty of the Court to adhere to the Constitution and to declare the act null and void." *Vanhorne's Lessee v. Dorrance,* 2 Dall. (U. S.), 304. The whole subject is

treated very fully and very clearly in Modern Am. Law (Vol. XI), pp. 64 to 80.

It hardly need be said that no Court would declare a statute void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. It need only be added that this Court, in numerous decisions, has exercised this power without dispute or cavil, and for many years since *Bayard v. Singleton* was decided. The following are examples: *Jones v. Crittenden,* 4 N. C., 55 (suspension of payments of debts); *Trustees of University v. Foy,* 5 N. C., 59 (resuming escheated lands); *Allen v. Peden,* 4 N. C., 442 (emancipating slaves without owner's consent); *Robinson v. Barfield,* 6 N. C., 391 (validating improperly executed deeds); *Bank of the State v. Bank of Cape Fear,* 35 N. C., 75 (impairing obligation of contract as to payment of bank notes); *S. v. Moss,* 47 N. C., 66 (jurisdiction of intendant of police of Charlotte); *Stanmire v. Taylor,* 48 N. C., 207 (grant of land already sold by State); *Barnes v. Barnes,* 53 N. C., 366 (stay law); *King v. Comrs. of Lincoln,* 65 N. C., 603 (tax collector case); *Wesson v. Johnson,* 66 N. C., 189 (common-law right of dower as to prior marriages); *Galloway v. Chatham R. R. Co.,* 63 N. C., 147 (State subscription to railroad company stock); *People v. Bledsoe,* 68 N. C., 457 (government of penitentiary); *Bailey v. Caldwell,* 68 N. C., 472 (compensation of C. C. P. commissioners); *People v. McGowan,* 68 N. C., 520 (election of Keeper of Capitol); *Latham v. Whitehurst,* 69 N. C., 33 (requiring mortgage debts to be reduced to judgment). There are as many more cases, since decided, which expressly acknowledge this power without a dissenting voice, and some of comparatively recent date.

It also must be remembered that every case in which the question of the validity of a statute is considered by the Court, although the decision be in favor of it, is a concession of the principle that the Court may pass upon its constitutionality and declare it void in a proper case, for why discuss the question if the Court cannot decide upon it? See the Constitution of North Carolina annotated by Connor and Cheshire, p. 543, for cases.

In *Purnell v. Page,* 133 N. C., 125, it was held that the income of a Federal judge could not be taxed by the State, and *vice versa,* and that any attempt by the Legislature to impose such a tax would be futile, and when properly questioned would be declared void, and this position was conclusively maintained in a strong and able argument by the present *Chief Justice,* who referred to the opinions of Attorney-General Batchelor, adopted by the Supreme Court, composed then of *Nash, Chief Justice,* and *Pearson* and *Battle, Judges* (4 N. C., 555), and that of Attorney-General Gilmer, 131 N. C., 692, approved by the Court as denying the

power of the Legislature to tax the salaries of the judges, which would plainly be a diminution of them, forbidden by the Constitution.

It may be taken, therefore, as finally settled by this Court that the power to declare a statute invalid, as being unauthorized by the Constitution, exists, and that while the consideration of the question should be approached with great caution and the question itself examined with the most careful scrutiny, it will be pronounced invalid if it so clearly and obviously appears to be so that all reasonable doubt has been excluded. The Constitution is of paramount authority, and prescribes the rule to all departments of the government, to this as well as to the others, and each of them owes to it submission and obedience, and we should most willingly and cheerfully acknowledge its supremacy and render our allegiance to it accordingly as the highest law. Any other course, instead of perpetuating the blessings of the government, so happily designed by our forefathers and transmitted to us, would eventually lead to confusion, disorder and anarchy. Our oath, so carefully and impressively framed, binds us most solemnly to the performance of this higher duty to preserve and maintain the fundamental law.

CLARK, C. J., dissenting: In August, 1915, the Board of Commissioners of Cherokee regularly levied 19 cents for county general tax and (under the authority of chapter 33, Laws 1913) a special tax of 2⅔ cents on $100 valuation of all property listed in Cherokee County. This special tax was levied as authorized by the General Assembly by section 9, chapter 33, Laws 1913, and chapter 88, Laws 1913, and the amendments thereto, for the purpose of providing for the deficiency caused in the revenue of said county in 1914 by said chapter 33 and by section 3, chapter 201, Laws 1913, which rendered it necessary in order to take care of certain outstanding indebtedness of Cherokee which could not be met for the year 1914 out of the revenue raised by the 19-cent levy for said year.

The property of the plaintiff, the Southern Railway Company, in Cherokee County, consisting of some twenty-four miles of railroad track and its proportion of the equipment, engine, cars and investments and its franchise, was assessed for taxation at more than a million dollars, and the 2⅔ cent special tax levied against this property in aid of education (as against all other property holders in the county) amounted to $275.56. This action is brought to recover said sum which had been paid into the county treasury by the railroad company.

Said section 9, chapter 33, Laws 1913, provides: "The board of commissioners of any county in North Carolina be and they are hereby authorized and empowered to levy a special tax in excess of the constitutional limitation, not exceeding five (5) cents on the one hundred dol-

lars ($100) valuation of all property listed for taxation in their respective counties, to provide for any deficiency in the necessary expenses and revenue of said respective counties which may be caused by the provisions of this act."

Said act was passed to increase the revenue of the State for school purposes so as to provide for a six-months school term. Said act describes the levy authorized to be "a special tax," and the "special purpose" for which it is authorized is recited to be "to provide for any deficiency in the necessary expenses and revenue" of any county which might be caused by raising the State levy to 47⅔ cents. Not a dollar of this $275 was spent for schools, but was spent exclusively for other necessary county expenses.

In Connor & Cheshire on Cons., 281, it is said: "The equation and limitation placed upon taxation by Art. V, sec. 1, has no application to taxes levied hereunder for a special purpose, when levied with the special approval of the General Assembly," citing *Board of Education v. Comrs.*, 137 N. C., 310; *Jones v. Comrs.*, 107 N. C., 248; *Street v. Comrs.*, 70 N. C., 644; *R. R. v. Holden*, 63 N. C., 410; *R. R. v. Comrs.*, 148 N. C., 220. This has always been the necessary and indeed the only resource when a county has gotten in debt for necessary expenses. There is no other way for the county to redeem its credit. This deficit was not for schools but for the necessary expenses of the county, which was not allowed to levy over 19 cents by reason of the State tax.

The Constitution, Art. V, sec. 6, prescribes: "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." Adding this 2⅔ cents to the 19 cents already levied for county purposes makes a total of 21⅔ cents. This levy, far from exceeding "double the State tax," the limit named in this provision, is in fact considerably less than one-half the State tax, which was 47⅔ cents on the $100. Laws 1913, ch. 201, sec. 3.

The tax here in question is authorized for a special purpose "to provide for any deficiency in the necessary expenses and revenue of said respective counties," and received the special approval of the General Assembly, sec. 9, ch. 33, Laws 1913. This levy, therefore, is exactly within the authority of the General Assembly and the restrictions of the Constitution of the State. Art. V, sec. 6, above set out.

It is alleged, and correctly, that the insufficient levy of 19 cents to defray the county expenses was due to the fact that the State, in order to make adequate provision for the six-months schools, raised the tax levy for all State purposes to 47⅔ cents, and hence the margin between that and the normal 66⅔ cents left only 19 cents for the counties. It

became necessary, as is found as a fact by the county commissioners and also by the judge, and is not controverted, to levy the extra 2⅔ cents per $100 in order to defray the county expenses for necessary purposes. This levy in excess of the 19 cents being for necessary purposes did not require a vote of the people.

The levy of this tax in 1915 is stated by the board, and is found as a fact by the court, to be for the special purpose of taking up a note in bank made by the board of commissioners for a deficiency in meeting the necessary expenses of the county for 1914, and was authorized by chapter 88, Laws 1913, which recites the fact that the increase of taxes for the purpose of increasing school facilities would probably "leave the counties without sufficient revenue with which to pay their current necessary expenses." It therefore has the special approval of the General Assembly. Why refund it to plaintiff when the county must again collect it?

It is true that the General Assembly of 1913 increased the general State taxes 5 cents for the purpose of increasing the terms of the public schools to six months, but if there is any unconstitutionality it attaches to the increase of the general State tax by this 5 cents, and there can be no unconstitutionality in allowing the counties to levy additional taxes for necessary county purposes when the deficiency is not caused by county action or lack of legislative special approval. The complaint, if any, of the plaintiff should not be directed against the levy of this special tax for necessary county purposes with the special approval of the General Assembly, but against the legality of the 5-cent additional State tax levied by the Legislature for State purposes. In the language of the market-place, the plaintiff "has the wrong sow by the ear."

The county must pay its necessary expenses or it cannot continue to discharge its legitimate functions. Its credit will be destroyed and the county government will become inefficient. Its commissioners have not levied to exceed double the State tax, and the 2⅔ cents was for a special purpose, for which the General Assembly has given its special approval. The deficiency was caused by the action of the General Assembly, which has not been called in question in this or any other proceeding.

North Carolina not only stands at the foot of the States in illiteracy and in the shortness of school terms, but its levy of taxation for schools, for good roads, and public health is the lowest of any State in the Union, being less than half the average for such purposes levied by the other States of the Union. To meet this situation and remove this reproach, and enhance the welfare of the people whom they represent, the General Assembly of 1913 increased the school term to six months. And knowing that the appropriation therefor would render the margin left for county purposes insufficient for their administration, the General As-

sembly gave its special approval for this additional taxation by the counties. If there is any unconstitutionality in the action of the General Assembly it is in the levy for the six-months schools by the General Assembly, which is not impeached by this proceeding.

The people of the State, by a vote of more than 100,000 majority, have endorsed the action of the General Assembly of 1913, which has been followed by the General Assemblies of 1915 and 1917, by adopting the constitutional amendment requiring six-months term for public schools. At this term we have had three cases calling in question special taxation to extend school facilities. In each of the three this Court has invalidated the effort to do so. In *Williams v. Polk County* the act of the General Assembly authorizing the special tax was, however, not set aside by the Court, but the result of the election was invalidated because of an illegality in the manner of holding the election, and the Court was unanimous. In *Hill v. Lenoir,* the act of 1911 authorized any county to vote a special tax for school purposes, as the General Assembly has a right to do under the Constitution, and prescribed that at such election, if the entire county gave a majority for such tax, it should be a county measure, but that if it did not carry for the entire county it should be valid for each township in which such measure received a majority. This manner of voting was a matter within the good judgment of the General Assembly, and there was no provision of the Constitution pointed out which forbade the Legislature to authorize such manner of voting, nor any provision of the Constitution authorizing this Court to invalidate the action of the General Assembly. Besides, the act was a general one passed in 1911, and under it elections have been held in many counties, in some of which the counties, and in some townships, had adopted the special tax. A dissent was entered by me as to that decision and in this case.

The Supreme Court of the United States has repeatedly said that it would not hold an act unconstitutional unless it was so "beyond all reasonable doubt." *Ogden v. Saunders,* 12 Wheaton, 270; *S. v. Perley,* 173 N. C., 791; Cooley Cons. Lim. (7 Ed.), 254. For that reason, besides for those given in this dissent, it would seem that these measures which the General Assembly has enacted to give the children of the State a better opportunity for an education should not be disapproved and invalidated by this Court.

On the face of the Federal and State Constitutions it was clearly contemplated that the legislative department should be the guardian of the Constitution fully as much as the judicial, and that legislation held by it constitutional should be conclusively so, as in all other countries, subject only to the veto of the executive (where this is given) and to the approval of the sovereign at the ballot box. There is certainly no indi-

cation given in any Constitution of superiority or supremacy of the judicial over the legislative department.

Those who believe in the supremacy of the courts over legislation and the law-making body stress the fact that the judges are sworn to obey the Constitution, and therefore they must judge whether the Legislature has complied with the Constitution or not. But the members of the Legislature and of Congress are equally sworn to obey the Constitution, and therefore they, and not the courts, are charged with the duty of deciding whether legislation is in accordance with the Constitution or not. For the same reason, the Legislature is not empowered to hold that decisions of the courts in matters committed to them are unconstitutional.

If there was any provision in the State Constitution which empowers the Court to go behind such finding of the Legislature, it would be in effect giving an appeal from the Legislature to the Court. On an appeal from the Superior Court to this Court, five judges review the trial judge to insure uniformity in the law, because the Constitution confers the power. There is no such provision in the State Constitution as to the Legislature and the jurisdiction of the Court to go behind the finding by the two Houses of the General Assembly that an act is in conformity to the Constitution is logically and necessarily based upon the assumption that the Legislature has either ignorantly or intentionally violated the Constitution, and that therefore, of necessity, the Court, by reason of its superiority of wisdom or virtue, must have power to invalidate the action of the law-making body. This assumption has not been warranted by experience, and has no foundation in fact.

On an average, two-thirds of each House of the General Assembly and of both Houses of Congress have usually been lawyers. They have the intelligence to read the Constitution and the patriotism and integrity to observe it. The numerous instances in which the courts have overruled their own previous decisions on so-called "constitutional questions" (and others in which they should, or may yet, do so) are a judicial holding that the courts themselves have acted unconstitutionally. Certainly when the far greater number of lawyers in the law-making body, entrusted by the Constitution to make the laws in the discharge of the duty committed to them, hold an act constitutional, and a minority of the Court agree in that view, it cannot be held that the Legislature, "beyond a reasonable doubt," either ignorantly or intentionally, have violated their oaths to support the Constitution.

In the Convention at Philadelphia in 1787, which created the Federal Constitution, James Madison (afterwards President) and James Wilson (afterwards Justice of the U. S. Supreme Court) offered an amendment that all bills should be submitted and approved by the courts before be-

ing enacted. Though presented and pressed with great force, the proposition was voted on four times, and on each occasion defeated, receiving at no time the vote of more than three States. The authority of the courts to invalidate an act of Congress or State Legislature is not expressed in the Federal or any State Constitutions, but is derived from the decision in *Marbury v. Madison* by the U. S. Supreme Court in 1803, deducing it as a legal inference. It was denied then by President Jefferson, the founder of one of the great parties, and later by Abraham Lincoln, the leader of another. In view of the increasing number of cases involving matters of public policy in which the views of the courts are such as to invalidate legislation it may be wise (if the courts are to continue to assert this supreme and irreviewable power over legislation) to submit legislation to the courts for approval, as suggested at Philadelphia, before it is enacted, instead of having it vitiated afterwards. It would be a great economy of time and expense.

In this State, a somewhat similar decision, derived, like *Marbury v. Madison,* by legal deduction or inference, in *Hoke v. Henderson,* 15 N. C., 1 (Dec., 1833), for seventy years was an obstruction to legislation and a constant source of conflict between the Legislature and the judiciary until after being affirmed sixty times, it was finally overruled as unfounded in *Mial v. Ellington,* 134 N. C., 131 (1 Dec., 1903). One Federal Supreme Court decision was corrected by the Eleventh Amendment and another by the Seventeenth Amendment, and in the *Adamson Law case* the Court overruled, and thereby held unconstitutional, its previous decision in the *Lochner case.* Courts make errors as well as Legislatures and Congress (as shown by overruling decisions and others which should be overruled), and their correction by constitutional amendment is too dilatory for a progressive age and people and too costly a deference to a merely hypothetical and supposed infallibility in the courts.

THE DANVILLE LUMBER AND MANUFACTURING COMPANY v. THE GALLIVAN BUILDING COMPANY ET ALS.

(Filed 3 January, 1919.)

1. Appeal and Error—Instructions.

When a charge, construed as a whole, is not to the appellant's prejudice it will not be considered as reversible error on appeal.

2. Courts—Instructions—Weight of Evidence.

Objection that a verdict is contrary to the weight of the evidence is directed to the legal discretion of the trial judge, whose action thereon will not be disturbed on appeal.

3. Appeal and Error—Instructions—Inadvertence—Harmless Error.

A slight inadvertence of the trial judge in his instructions to the jury which does not change the sense of the charge, construed as a whole, or tend to mislead the jury, will not be held as substantial or prejudicial error.

4. Appeal and Error—Objections and Exceptions—Instructions—Contentions.

An erroneous statement by the trial judge of the contentions of the parties must be called to his attention at the time to afford him an opportunity to correct it, or it will not be considered on appeal.

5. Waiver—Intent—Knowledge—Burden of Proof—Evidence.

Where there is evidence tending to show that the vendor, furnishing sash for a building, sent them to the vendee for the latter to examine to see if they were all right for the purpose, and after the former had made changes in accordance with suggestions the latter accepted and used them, it is sufficient for the jury to find that the intent of the vendee was to waive any defects therein, with knowledge thereof, the burden of proof being on the plaintiff to show an acceptance unless there had been a concealment of the defects by the defendant, in which case the burden would be upon the defendant.

6. Waiver—Definition—Estoppel.

The doctrine of waiver applies where a person knowingly and intentionally dispenses with the performance of an obligation owed by another to him, either expressly or impliedly, and while the doctrine of estoppel has a fundamental relationship to it, it is distinguishable in several of its features, as explained in the opinion.

APPEAL by defendant from *Shaw, J.*, at the June Term, 1918, of ROCKINGHAM.

M. K. Harris, J. M. Sharp, and J. R. Joyce for plaintiffs.
Pharr & Bell for defendant.

PER CURIAM. The Court is of the opinion that this case has been tried without any error in the Superior Court. The charge must be taken as a whole, and, thus construed, we do not find that there has been anything omitted or inserted to the defendant's prejudice; nor do we think it is subject to criticism as being one-sided.

The jury must have found that the ten samples of sash were not sent to defendant to be fitted to the openings, but to be examined and inspected to see if they were made according to the plans and specifications, and as they were retained without objection the plaintiff had the right to infer that they were satisfactory and would be accepted as a compliance with the contract, both as to material and workmanship, except as to those defects specified in the conversation at the mill and in the suggestions of Mr. Coughlin about the grooves and the beveling of the bottom of the sash, so as to fit them in instead of making them

square, and perhaps one other suggestion made in a letter that Coughlin wrote the next day. The court instructed the jury as to these matters, we think, very fully and impartially. They were questions of fact for the jury to decide, and after careful examination of all the evidence, the prayers for instructions, and the charge, we are unable to find any substantial ground upon which to assign error prejudicial to the defendant. There was strong evidence which would have warranted the jury in finding for the defendant upon all the issues, and it may be that they should have done so, but in this respect we have not the power to help the defendant, as the power to set aside a verdict which is erroneous in the jury's estimate of the weight which should have been given to the evidence belongs to the judge who presided at the trial. If the entire charge is considered, we think the jury were instructed, and must have understood how they should answer the issues, as they might find the facts to be, whether in favor of the one side or the other.

The jury answered the first two issues and the fourth in favor of defendant, and the third issue was the important one in settling the question in controversy. As to this issue, the judge instructed the jury as follows: "The third issue is, 'If not, did the Gallivan Building Company agree to accept said material as furnished by the plaintiff?' The burden is on the plaintiff to show this by the greater weight of the testimony. You will answer the issue 'Yes,' otherwise you will answer it 'No.'" It is true that immediately afterwards he did state the plaintiff's contention at some length, but he then gave the defendant's contention, his opening sentence being, "Now, the defendant contends you ought to answer that (third) issue 'No.'" He then stated at length the defendant's view concerning it, and we cannot see that the statement of the two contentions to the jury were not equally full, fair and impartial. The instruction as to the quality of the glass was not one-sided, when reference is made to the context of the charge upon the third issue. The judge had stated the plaintiff's contention and at the end of the statement gave the instruction to which the exception was taken. He then stated the defendant's contention as to the sash and the quality of the glass, and especially did he say that the defendant insisted that the issue should be answered in its favor—that is, "No." The jury must have understood from all this statement of the two contentions that if they found the facts to be as the plaintiff contended they would answer the third issue "Yes," and if as the defendant contended, they would answer it "No."

In an elaborate charge, slight inadvertence not changing the sense nor calculated to mislead the jury are not so substantial and prejudicial as to call for a reversal. We have held that if contentions are not properly stated, the attention of the court should then be called to the omis-

sion so that it may be supplied. The latest cases are *Muse v. Motor Co.*, 175 N. C., 466; *S. v. Davis*, 175 N. C., 724. See, also, *Jeffress v. R. R.*, 158 N. C., 215; *S. v. Johnson*, 172 N. C., 920; *S. v. Blackwell*, 162 N. C., 672; *McMillan v. R. R.*, 172 N. C., 853.

"Even if there is technical error, courts will not reverse when it is slight and it clearly appears that it is not substantial and could not have affected the result." *S. v. Davis, supra; Goins v. Indian Training School*, 169 N. C., 737; *Elliott v. Smith*, 173 N. C., 265.

As to the requirement of knowledge on the part of the defendant of any defects in the sashes or glazing to constitute a waiver of them, it cannot be denied that such is the law, because a man cannot be said to waive that of which he has no knowledge, and waiver is largely a matter of intent. But the jury could infer, as they seem to have done, that the sash were sent to defendant for inspection and not for fitting, and that defendant had acquired by examination the requisite knowledge of any defects. The charge sufficiently covered this question. But the third issue did not, in terms, present the question of waiver, but that of acceptance, for its form is, "Did the lumber company agree to accept the material as furnished by the plaintiff?" The judge properly placed the burden of this issue on the plaintiff, but if there had been any concealment of defects by it the burden of showing this would have been on the defendant. There was evidence of an acceptance, and the jury have found as a fact that there was one.

But upon the question of waiver it may be said that it takes place where one person dispenses with the performance of something which he has a right to exact of another, and it is said to be a technical principle introduced and applied by the courts for the purpose of defeating forfeitures. While it belongs to the family of estoppel and the doctrine of estoppel has a fundamental relation to it, being the foundation upon which it to some extent rests, they are nevertheless distinguishable terms, though it may be difficult to draw the distinction between them which will give to each a clear legal significance and scope, separate from and independent of the other, as they are not infrequently used by the courts as convertible terms, especially when dealing with insurance companies, and aid in the avoidance of forfeitures. There are, however, several essential differences between them, and they may be thus illustrated: Waiver is the voluntary surrender of a right, while estoppel is the refusal to permit its assertion because of the mischief that has been done. Waiver involves both knowledge and intention, the one being essential to the other; an estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do, and involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has

been misled to his prejudice or into an altered position, an estoppel always involves this element. Estoppel results from an act which may operate to the injury of the other party, waiver may affect the opposite party beneficially. Estoppel may carry the implication of fraud, and sometimes fraud is clearly, but not so in the case of waiver. The latter is a voluntary act and exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right. "Knowledge of the existence of the right, benefit, or advantage on the part of the party claimed to have made the waiver is an essential prerequisite to its relinquishment. No one can be said to have waived that which he does not know, or where he has acted under a misapprehension of facts. Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim. The knowledge may be actual or constructive; one cannot be willfully ignorant and relieve himself from a waiver because he did not know. The question of waiver is mainly one of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waive, when he will be forbidden to assert the contrary.

Since intent is an operation of the mind it should be proven and found as a fact and is rarely to be inferred as a matter of law. It should clearly be made to appear by the evidence, and the best evidence of intention is to be found in the language used by the parties, though it may appear in their conduct. The true inquiry is what was done, said or written, and whether it indicated the alleged intention. The secret understanding or intent of the parties is immaterial on the question of waiver. As we have said, which is important in this case, the intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties, from which it may reasonably be inferred, or even by nonaction on their part. Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred, especially where such silence is unaccompanied by any act or conduct calculated to mislead.

Briefly defined, therefore, waiver is the intentional relinquishment of a known right, either express or to be implied from acts or conduct. 29 A. & E. Enc., 1091; 40 Cyc., 254 *et seq.* Bishop on Contracts, sec. 792, thus defines waiver: "It is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with

the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." *R. R. v. Burwell,* 56 Fla., 217, esp. at p. 228; *Fraser v. Ins. Co.,* 114 Wis., 510, 523; *Rice v. Fid. & Dep. Co., supra; Reid v. Field,* 96 Va., 26, 33; *R. R. v. Hendricks,* 108 S. W., 745, 749; *Thompson v. Gormer,* 36 Pac. (Cal.), 434, where the Court says, quoting from 2 Herman on Estoppel, sec. 825: "A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other."

It is said in 29 A. & E., at pp. 1095, 1096: "The intent to waive may appear as a legal result of conduct. The actuating motive, or the intention to abandon a right, is generally a matter of inference to be deducted with more or less certainty from the external and visible acts of the party and all the accompanying circumstances of the transaction, regardless of whether there was an actual or expressed intent to waive, or even if there was an actual but undisclosed intention to the contrary. The decisions declaring intent to be the essence of waiver recognize that the intent may be inferred from a party's conduct." This is more like an estoppel. The intent, though, may be inferred by the jury. *Rice v. F. & D. Co.,* 103 Fed., 427, 435.

The above definitions and illustrations of this ever-recurring principle of the law will be met with frequently in the books, as above shown. The difficulty is in the application of the doctrine to any given case. Under the evidence and a correct charge of the court, the jury have found that the sash were sent to defendant for inspection, so that defects, if any, might be noted, as they were to serve as models for the remaining lot. Certain defects were pointed out, and there being no further complaint the jury found that the others, if any, were waived. If they were concealed, so as not to be discoverable by a reasonable and careful inspection, the jury have not so found.

We repeat that the issue involved was largely, if not wholly, one of fact. The judge, we think, fairly and understandingly presented the questions of law to the jury. If the defendant inspected the goods and had a fair opportunity to do so, and was not prevented from a discovery of any defects by concealment or otherwise (these being questions for the jury), and specified certain defects, the jury might infer knowledge and a waiver of any other defects. The fault, if any, was with the jury in finding the facts contrary to the weight of the evidence and the de-

fendant's contentions, but this could only be corrected and the matter set right by the intervention of the judge, in the exercise of his discretion, to grant a new trial.

It must be certified that no reversible error appears in the record.

No error.

JOHN H. DILLARD AND T. J. HILL v. HIAWASSEE RIVER POWER COMPANY.

(Filed 3 January, 1919.)

Attorney and Client—Attorneys' Fees—Reference.

APPEAL by defendant from *Lane, J.*, at the April Term, 1918, of CHEROKEE.

Witherspoon & Witherspoon and M. W. Bell for plaintiffs.
J. N. Moody for defendant.

PER CURIAM. This is an action brought by the plaintiffs to recover of the defendant for legal services rendered the defendant. The defendant, answering the complaint, averred it had paid the plaintiffs the sum of $1,800 for said services, and that this was all their services were reasonably worth.

The case was referred to J. D. Mallonee, referee, to state the account between the parties. The referee heard the matter and reported his findings of fact and conclusions of law to April Term, 1918, of the Superior Court, and it was heard upon exceptions to the referee's report, before Judge Lane. His Honor sustained all the findings and rulings of the referee and overruled all exceptions to the referee's report, as well as all objections taken by the defendant to the evidence as it was taken before the referee and rendered judgment for plaintiffs. The defendant excepted and appealed to the Supreme Court.

The first thirty-nine exceptions were taken to the referee's report, to both his findings of fact and conclusions of law, and whether these exceptions, or any of them, should be sustained, it is admitted, depends largely upon the consideration of the exceptions to the testimony of the plaintiff Hill and that of Norvell, a witness for the plaintiff, the latter having testified as an expert.

We have examined the numerous exceptions and think they cannot be sustained, and that it is needless to discuss them.

Affirmed.

T. W. MEWBORN, EXECUTOR OF MRS. SARAH L. ASKEW, v. L. C. MOSELEY.

(Filed 3 January, 1919.)

1. **Wills—Direction—Sale of Realty—Debts—Personalty Sufficient.**

A will directing the executor to sell all of the testator's real and personal property and pay all funeral expenses and just debts, "giving and devising" a certain sum of money to each of his brothers and sisters in Item 2, and in Item 3 "giving and devising" equally to his heirs, naming them "the balance of his estate: *Held*, the testator is presumed to have known the kind and value of his property with relation to his debts, and that his personalty would be sufficient to pay his debts without resorting to a sale of his realty, and the mandate to sell all of the real and personal property should be complied with and the proceeds distributed as directed in the will.

2. **Wills—"Give and Devise"—Intent.**

Where it appears from the terms of the will by the indiscriminate use of the words "give and devise" that the testator intended them to apply to his realty, the will, in that respect, will be so construed.

3. **Wills—Power of Sale—Implied Power—Deeds and Conveyances.**

The power of an executor to make a deed is implied by an express mandate in the will to sell the testator's lands.

4. **Wills—Power of Sale—Election—Reconversion.**

Where the executor has sold lands under a power contained in the will without giving the devisees the right to take it in its original state, the equitable right of reconversion does not arise.

APPEAL by defendant from *Allen, J.*, at chambers, 6 December, 1918, of LENOIR.

This is a controversy without action, submitted upon a case agreed, under Revisal, sec. 803.

Mrs. Sarah L. Askew died, leaving a will as follows:

"I, Sarah L. Askew, of the aforesaid county and State, being of sound mind, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament:

"1. My administrator hereinafter named shall sell all of my real and personal property and pay all funeral expenses, together with all my just debts, out of the first moneys which may come into his hands belonging to my estate.

"2. I give and devise to each of my brothers and sisters fifty dollars.

"3. I give and devise equally to my heirs hereinafter named the balance of my estate: Fannie L. Jackson, Mary V. Jackson, Nonie E. Barker, Hildah W. Baxton, Charlie B. Whitfield, Paul Holland, Leonard Fields, William Askew Barker, Bertha W. Edwards.

"4. I hereby constitute and appoint my friend T. W. Mewborn my lawful administrator to all intents and purposes to execute this my last

will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

"In witness whereof, I, the said Sarah L. Askew, do hereunto set my hand and seal, this 4 February, 1916.

"SARAH L. ASKEW. (SEAL)"

The will was properly executed and attested, duly admitted to probate, and the executor (called administrator), who is the plaintiff herein, qualified as such. He sold all the land at public sale, under the power contained in the will, and the defendant became the purchaser at $32,200 and plaintiff tendered to him a good and sufficient deed for the land, but he refuses to accept the same, alleging that the plaintiff, as executor, had no power to sell the land, there being personal property of the testatrix sufficient to pay the debts and specific legacies and costs of administration. The court held that the executor had the power to sell, and gave judgment for the plaintiff.

Rouse & Rouse for plaintiff.
Dawson, Manning & Wallace for defendant.
Cowper, Whitaker & Hamme for defendant J. D. Mason.

PER CURIAM. The will provides that the executor shall sell *all* of the real and personal property, and we do not see why these words should not have their primary or ordinary meaning and require the executor to do what the language so clearly directs that he shall do. 40 Cyc., 1396, 1397. The testatrix is presumed to have known the kind of property she owned, and the value of it, when she made the will, and she knew, therefore, that her personal property would pay all debts, costs and expenses, and legacies, and yet she directed the sale of *all* of her property, personal and real. There is nothing in the will to show that she directed the sale merely to pay debts and costs of administration, or legacies, and to the extent only that it was necessary to do so. We must give to her language its usual meaning, and we find no restriction on the power of sale, which extended to all she had.

It may be that she entrusted the plaintiff with this broad power because of her great confidence in his integrity and sound judgment, believing he would sell the property to the best advantage. But whatever her reason, we must be governed by what she has plainly said. The use of the word "devise" in the third section of the will does not limit the power. She also used the word "give," which is appropriate to the creation of a legacy and to a devise of realty. It will be observed, too, that she uses the same words, "give and devise," in section second of the will,

where she bequeaths the pecuniary legacies of fifty dollars each to her brothers and sisters, showing that she employed them indiscriminately, or as applying to both real and personal property, without knowing their true and distinct meaning in law. She was not speaking with nicety or with strict or technical accuracy, nor was she trying to do so.

In this case the power to sell is mandatory, the direction being couched in imperative language, and it appears to have been conferred upon the executor not only to pay debts, legacies, costs and expenses, but also to effect a fair and an equal division of the balance of her estate, as shown by the third clause. 2 Underhill on Wills, 959, 960.

"The intention to require a sale is most commonly manifested by an express direction in the will that land shall be sold." 2 Underhill on Wills, 958.

Here she directs that both kinds of property, land and personal property, be sold. The intention is too clear to be disregarded. "If a testator devises land to be sold, or orders or directs that the same shall be sold, it is obvious that it is the imperative duty of the trustees to make the sale. They have no discretion in the matter. They are simply to turn the real estate into personalty and to apply the money thus realized to the purpose designated in the will." *Clifton v. Owens,* 170 N. C., 607, at p. 614; Bispham's Equity, 426. It was the purpose of the testatrix to have the entire property, real and personal, sold at all events.

When the testatrix, in the third clause of her will, used the words "I give and devise equally to my heirs hereinafter named the *balance* of my estate," she evidently referred to the residue, or what was left of it, after paying costs and expenses, debts and legacies. If she had intended to spare the land and let it go in kind, as the "balance," to her heirs, it was very easy to have so expressed her will or intention, for she well knew the exact situation and the composition and value of her estate.

While the testatrix, after requiring that all of her property of every kind be sold, directs that her debts and the costs and expenses be paid out of the first money coming into the hands of the executor, this does not necessarily imply that the sale was ordered for the purpose only of paying debts, as was the case in *Sweeney v. Warren,* 127 N. Y., 426, so much relied on by the defendant, but the direction that the debts be paid out of the first money received by the executor was merely an expression of her wish as to how the distribution should, in part, be made, which happened to be the natural and usual order of its disbursement. She desired to be just before she was generous. It was not the sole purpose of the sale, but only an incidental order as to how the fund or proceeds of the sale should be administered. This distinguishes the case from the one cited.

The executor has the power to make a deed which is incident to and

will be implied from the power to sell expressly given. *Foster v. Craige,* 22 N. C., 210; 11 R. C. L.; *Broadhurst v. Mewborn,* 171 N. C., 400. This is so because where a power is conferred all that is necessary to its proper execution goes with it. The case we have just cited also has a bearing upon the other matters which we have discussed.

There is no question as to the equitable right of reconversion. The property has been sold without any election on the part of the devisees to take it in its original state.

The presiding judge committed no error in his ruling.

Affirmed.

CHARLES A. MOORE v. THOMAS J. HARKINS, ADMINISTRATOR OF H. S. HARKINS.

(Filed 3 January, 1919.)

1. Appeal and Error—Verdict Set Aside—Evidence—Former Decision.

Where a plaintiff has been nonsuited in an action on a draft on the ground that the draft had not matured at the time of the commencement of the action, and the nonsuit has been affirmed on appeal, it is erroneous for the trial judge to set aside a negative finding of the jury upon the issue as to the statute of limitations, in a second action brought within the statutory period after maturity of the instrument.

2. Appeal and Error—Issues—Instructions—Verdict Set Aside—Harmless Error.

Where the jury have answered the first issue as to the defendant's indebtedness on a draft in an action between the original parties in the negative, and there was allegation and conflicting evidence as to whether the draft was for value, with correct instruction thereon as to how the jury should find in either event, the finding of the jury in the negative upon this issue disposes and renders immaterial the action of the judge in setting aside a negative answer to the second issue as to the statute of limitations and rendering judgment on the first issue.

ACTION tried before *Stacy, J.,* at April Term, 1918, of BUNCOMBE, upon these issues:

1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: "No."

2. Is the plaintiff's claim barred by the statute of limitations? Answer: "No."

The court set aside the verdict on the second issue and rendered judgment against plaintiff upon the first issue. Plaintiff appealed.

Craig, Erwin & Craig for plaintiff.

Kingsland Van Winkle, J. E. Swain, and Mark W. Brown for defendant.

PER CURIAM. A former case between the same parties was brought to this Court and is reported 171 N. C., 697. In that case it was adjudged that the claim was not due at commencement of that action, and the judgment of nonsuit was sustained. This is substantially the same case as the former, where the facts are set out in the report of the case and in the opinion of the Court. The second issue was therefore answered correctly. But setting it aside is an immaterial matter in the view we take of the case.

The plaintiff contended that the drafts sued on and described in the 171 N. C. report of the case were obligations of the drawer, Harkins, and were given for full value and to be paid by the drawee, Douglas, when he collected the money from the U. S. Government.

The defendant contended that the drafts were not given for value, but solely to enable plaintiff to collect from Douglas the fees from the U. S. Government, which fees had been assigned to plaintiff by Harkins, on 18 February, 1880, the date of the drafts.

After stating the evidence and contentions of the parties, his Honor charged the jury: "If you find as a fact and are satisfied by the greater weight of the evidence that these drafts were given to the plaintiff for value, and that they have not been paid, and they are now due, I charge you it would be your duty to answer the first issue 'Yes, and in the sum of $1,400, with interest from 18 February, 1880'; but if you do not find that these drafts were given for value, why it would be your duty to answer the first issue 'No.'"

We think the charge on the first issue was correct and practically reduced the controversy to one of fact, which has been settled by the jury's finding on the first issue.

No error.

STATE v. FRANK KEEVER.

(Filed 3 January, 1919.)

1. Homicide— Harmless Drinks— Vendor and Purchaser— Poison— Death— Presumptions—Evidence—Burden of Proof.

Where there is evidence tending to show that the defendant sold an ordinarily harmless beverage, but drinking of which produced death, and it was afterwards found to contain 38 per cent of a deadly poison, a *prima facie* case is made out against him, whereupon he must show matters of exculpation; and where no felonious purpose to commit murder by poisoning, with malice aforethought, is indicated, it is sufficient to support a verdict of manslaughter.

2. Appeal and Error—Assignments of Error—Instructions—Verdict—Harmless Error.

Where the jury have rendered a verdict of manslaughter against the defendant on trial for homicide, errors assigned relating to the charge of the court as to murder in the second degree of murder are regarded as immaterial on appeal.

3. Homicide—Intoxicating Liquors—Poison—Vendor and Purchaser—Criminal Intent—Manslaughter—Evidence.

One who intentionally puts wood alcohol into a harmless beverage to produce intoxication, and sells the same, acts recklessly and in violation of the prohibition law, and though he has done so without knowledge of its poisonous quality, and death thereby results to others by drinking it, he is guilty of manslaughter.

INDICTMENT for murder, tried before *Cline, J.*, at July Term, 1918, of CATAWBA.

The defendant was put on trial for murder in second degree and convicted of manslaughter and sentenced to penitentiary. From which judgment he appealed.

Attorney-General Manning, Assistant Attorney-General Nash, and A. A. Whitener for State.

W. C. Feinster and W. A. Self for defendant.

BROWN, J. The defendant was indicted in separate bills for the murder of Louis Smyre and Garland Bolick. By consent, the bills were consolidated and tried as one case.

The assignments of error are directed to the refusal to sustain motion to nonsuit and to the charge of the court. The facts of the case as disclosed by the evidence are substantially these: The defendant sold to the deceased, in February, 1918, two quarts of cream soda and one pint of ginger extract, contained in glass bottles, which had been left over from a bottling plant formerly conducted by one Thomas Carper, and which had been stored for several years in a barn of one Misenheimer after Carper closed up his business. This liquid was taken from the barn by the defendant to sell. Both the deceased drank the liquid and were taken violently ill and shortly thereafter died from the effects. Others who drank the liquid from the same bottles were taken sick, but recovered.

The evidence tends strongly to prove that the liquid sold to the deceased by defendant contained at the time 38 per cent of methol, or wood alcohol, a very deadly poison. There is no evidence that wood alcohol was an ingredient in the cream soda. The bottles were unlabeled and there was nothing to indicate that the contents contained a violent poison.

The motion to nonsuit was properly overruled. When the State introduced evidence tending to prove that the defendant sold to the deceased

a beverage, 38 per cent of which was of a well-known deadly poison, and that deceased died from the effects, it made out a *prima facie* case. It is true the circumstances of the sale plainly indicated there was no felonious purpose to commit murder by poisoning with malice aforethought, but defendant is not charged with that.

The State was not called upon to prove that defendant put the deadly poison in the otherwise harmless soda and ginger. That may be inferred by the jury from the circumstance that defendant was selling it. The burden is on the defendant to exculpate himself by satisfying the jury that he had no knowledge of the existence of the poison in the liquid. It is a known fact that cream soda and ginger in a normal state do not contain a deadly poison, and if the liquid he was dispensing contained it, as the undisputed evidence shows, it was incumbent on defendant to satisfy the jury that he did not put the poison in the liquid and did not know it was there when he sold it. This was a fact exclusively within his own knowledge.

The rule is thus stated in Foster's Crown Law, p. 255: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth; and very right it is that the law should so presume. The defendant in this instance stands upon just the same ground that every other defendant doth; the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them." *S. v. Arnold,* 35 N. C., 184; *S. v. Slagle,* 83 N. C., 630; Wharton on Crim. Ev., sec. 341; *Askew v. U. S.,* 165 U. S., 165.

There was no way by which the State could well prove directly that the defendant knew that there was wood alcohol in the liquid. Therefore, where it proved the actual killing by the poison supplied by defendant, he must show mitigation or excuse. A similar principle has been frequently recognized in this Court. A killing with a deadly weapon, admitted or proven, implies malice, and, nothing else appearing, the prisoner is guilty of murder in the second degree, and the burden rests upon him to show matters of mitigation or excuse. *S. v. Davis,* 175 N. C., 723, at 728.

The third assignment of error relates to the charge of the court as to murder in second degree, and as defendant was acquitted of that offense need not be considered. The other assignments relate to the charge upon manslaughter. The learned judge presented that view of the case to the jury in these aspects:

1. If they find that defendant intentionally put the wood alcohol in the extract, with the intent to make it intoxicating, without knowing it was a poison.

2. If they find that the defendant put the alcohol in the drink in such way as to manifest a reckless disregard of human life.

3. If they find that defendant was intending to make an intoxicating liquid to sell in violation of the laws of this State, and in doing so got into it wood alcohol, which poisoned and killed the ones imbibing it.

If the defendant put wood alcohol in the liquid to produce intoxication, without knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well as a reckless business, and if death ensued because of such poison he is guilty of manslaughter.

The sale of intoxicating liquor is now banned and condemned by the laws of the Nation and most of the States, including North Carolina. To sell it is not only *malum in see,* but *malum prohibitum.* When the defendant sold this liquid to the deceased he was engaged in an unlawful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter.

The charge of his Honor is fully sustained by the evidence and is a very clear and fair presentation of every phase of the case.

No error.

STATE v. THOMAS LUNSFORD ET AL.

(Filed 3 January, 1919.)

1. Appeal and Error—Evidence—Instructions—Harmless Error.

Error committed by the trial judge in permitting the solicitor to argue to the jury on a trial for larceny, that evidence admitted only for the purpose of impeaching the defendant was substantive evidence, is cured by an instruction that the evidence could only be considered by them for the purpose of impeachment.

2. Larceny—Evidence—Substantive Evidence—Impeaching Evidence—Trials—Questions for Jury.

Where the evidence tends to show larceny of a certain amount of money by the uncle of the prosecuting witness, and that another uncle proposed to the defendant to make it up, as it was a family affair, to which no reply was made, but the defendant's uncle procured and paid to the prosecuting witness a part of the amount, the balance being found and restored under circumstances tending to connect the defendant therewith, and that the defendant had agreed that a third person should pay the money back to the prosecuting witness, which plan was not followed: *Held,* under the circumstances of this case there was sufficient circumstantial evidence to connect the defendant with the return of the money by his uncle, and to make it competent as substantive evidence, and also impeaching evidence as it tended to prove an attempt to compound a felony.

STATE *v.* LUNSFORD.

INDICTMENT of the defendant and his wife, Nettie, for the larceny and receiving of twenty-two dollars, the property of Will Allmond. The wife, Nettie, was acquitted and the defendant was convicted and appealed from the judgment upon such conviction.

In the early part of 1918, Will Allmond and his brother Vester spent the night at the house of the defendant, who was an uncle of both boys, the defendant and his wife being absent. Will had $34 in a purse which was there in the possession of his brother Vester. The next morning the defendant, Tom Lunsford, came. While he was there, he and Vester counted the money and Tom told Vester to give it to Will, which was done. Tom then returned to Calvin Lunsford's, where he and his wife were nursing a sick child, and Vester Allmond soon after. Will Allmond remained at Tom Lunsford's all of that day. Tom and his wife, Nettie, returned home in the afternoon and Will spent the night with them. Between 10 and 11 o'clock that night Will, who had not been asleep, saw Tom and Nettie Lunsford take the money out of the breast-pocket of his coat, count it, and take all of it except $12. He heard them say, "We will leave him $12." This is the substance of the testimony of the prosecuting witness, Will Allmond.

Allmond got all of his money back, as follows: Eight dollars advanced to Lewis Lunsford by Abernathy, the storekeeper; $10 said to have been found by Jake Lunsford at the fence about his father's place; $3 claimed to have been found by the defendant Tom Lunsford at the woodpile the morning after the alleged theft, and $1 said to have been picked up by the son of the defendant at the branch and turned over to the magistrate, Parker. All this finding of money, except the $3 which Allmond says he saw the defendant drop, was after the arrest of the defendants.

Lewis Lunsford testified in behalf of the defendant, and on cross-examination the State was permitted to show that he tried to get the matter "hushed up," and that he got Mr. Abernathy to return $8 of the money to Allmond, and the defendant excepted.

Both defendant and Lewis testified the defendant knew nothing of the return of the money. The court admitted the evidence for the purpose of impeachment, but did not stop the solicitor, who argued that the return of the $8 was substantive evidence of guilt, although requested to do so, and the defendant excepted.

The court, however, referred to the evidence of the return of the $8 in the charge, and instructed the jury as follows: "I instructed you before, gentlemen, when the evidence was admitted, that it was admitted to show whether there was any bias or feeling, and as to whether they should believe him or not, and to show whether or not he had sufficient interest in the matter to swear falsely, and could not be used as a circumstance against these defendants because they would not be respon-

sible for anything he did, and no circumstance or act or conduct that the uncle did in giving the money back, unless done at their request and for them, could be used as any circumstance against them, and there is no evidence in the case tending to show that he did it at their request."

Attorney-General Manning and Assistant Attorney-General Nash for State.

J. H. McCall and Dillard & Hill for defendant.

ALLEN, J. If his Honor committed error in failing to stop the solicitor when he argued that the fact that Lewis Lunsford returned $8 to the prosecuting witness was substantive evidence of the guilt of the defendant Tom Lunsford, this error was cured by the subsequent explicit charge to the jury that the evidence could not be considered except for the purpose of impeaching the witness, unless the money was returned at the request of the defendant, and that there was no evidence of such request. *Bridgers v. Dill,* 97 N. C., 222; *S. v. Crane,* 110 N. C., 530; *Wilson v. Mfg. Co.,* 120 N. C., 95; Michie's Dig., V. 1, p. 758.

The evidence itself was clearly competent for the purpose of impeachment, because when considered in connection with the evidence that the witness was trying to settle the matter out of court and prevent a criminal prosecution, it tended to prove an attempt to compound a felony. We are also of opinion it was fit to be considered as substantive evidence of guilt.

It is true Tom and Lewis testified that Tom knew nothing of the return of the money, but their evidence does not conclude the matter. If it did we would have to order the discharge of the defendant because he swore he did not steal the money. There is, however, circumstantial evidence tending to connect the defendant with the return of the $8.

Tom and Lewis are brothers and the prosecuting witness their nephew. There is evidence that the defendant said to the prosecutor some time before the trial, "Make it up," and Lewis said to him in the presence of the defendant a week before the trial, "Go home and let's make it up. It's kinfolks, Let's make it up." This statement of Lewis was apparently acquiesced in by the defendant as he remained silent in the presence of a proposition to "make it up." The defendant testified that Lewis first came to him about making it up, and while he did not agree to do so he did agree to leave it to Mr. Abernathy to pay the prosecutor.

It was also in evidence that one of the sons of the defendant found ten one-dollar bills in a fence corner near defendant's house, that another son found one dollar in a branch near by, and another son found on the ground three one-dollar bills which defendant dropped from his pocket; that these different amounts were returned to the prosecutors, making,

with the $8 paid by Lewis, $22, the amount stolen. This at least justifies the argument that Tom and Lewis were trying to stop the prosecution by the return of the money, and that Lewis was the active agent.

No error.

STATE v. MARTHA FAIN.

(Filed 3 January, 1919.)

1. **Criminal Law—Evidence—Footprints—Comparisons—Burnings.**

Where evidence of the foot tracks of the defendant, tried for burning a barn, are competent, testimony as to the comparison of the tracks found at the place at the time of the occurrence with others testified by a witness to be the footprints of the accused that he had seen her make is also competent.

2. **Criminal Law—Evidence—Burnings.**

With other evidence tending to show the guilt of the accused of burning a barn, testimony that a bottle with the odor of kerosene was found at the premises with a piece of paper rolled as a stopper, which exactly fitted a torn page in the defendant's possession, is competent.

3. **Evidence—Witnesses—Bias.**

Testimony that a witness on the trial of one accused of a criminal offense was also a witness against the defendant in another case is incompetent to discredit the witness or show his bias.

4. **Appeal and Error—Evidence—Objections and Exceptions—Competent in Part—Harmless Error.**

Where husband and wife are tried for a criminal offense, testimony that her husband in her presence "began to talk pretty ill" is too indefinite to be a ground of error, and where it is competent against the husband a general exception to its admission by the wife will not be considered on appeal under Rule 27, especially where nothing prejudicial to her appears.

5. **Criminal Law— Instructions— Reasonable Doubt— Appeal and Error— Harmless Error.**

A part of a charge in a criminal action will not be considered as reversible error for the failure of the judge to charge that the burden of proof was on the State to show guilt beyond a reasonable doubt, when he has so charged, clearly and distinctly, in immediate connection therewith and repeated this instruction in other appropriate parts of the charge.

6. **Criminal Law—Instructions—Witnesses—Character.**

Where in a criminal action evidence as to the character of the witnesses on both sides have been introduced, an instruction by the trial judge, impartial to them all, that the jury should take into consideration the characters which they have "tried" to prove, etc., will not be held for error, the expression "tried," etc., taken with the text, being the equivalent of "evidence offered to prove," etc.

7. Affidavit for Continuance.

When it is agreed that "if a witness were here he would testify as stated in the affidavit offered for a continuance," this does not admit the truth of such statement.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1918, of CHEROKEE.

The defendant was indicted jointly with her husband for burning a barn. He was acquitted, but she was convicted and appealed from the sentence imposed.

Attorney-General Manning and Assistant Attorney-General Nash for State.

Witherspoon & Witherspoon and J. N. Moody for defendant.

CLARK, C. J. The defendant, as in the first trial recorded in Genesis, was accused jointly with her husband. But on this occasion the husband got off entirely. The evidence for the State showed as a motive that defendant's hogs straying out were impounded by the prosecutor, and threats by the defendant that the prosecutor's barn "would be burned if she was sent to the penitentiary, or hanged." There were also circumstances in proof connecting her with the burning, such as her track, which was identified from its peculiarity and measurement and shape; that a kerosene bottle was found the morning after the fire a few feet from the barn, smelling of kerosene oil, with some drops of oil remaining in it, and near by a piece of paper rolled as a stopper with the odor of kerosene on it which had been torn out of a catalogue in the defendant's possession, fitting in exactly with the rest of the torn leaf therein.

The defendant abandoned exceptions 1 and 16 expressly in his brief, and also exceptions 10, 11, and 12, by not referring to them in the brief.

Exception 2 to the evidence as to the defendant's tracks cannot be sustained. The witness testified that the track with which the track at the barn was compared "he knew was her track; that he saw her make it on Sunday and the fire was on Monday night." This was competent.

Exceptions 3, 4, and 5, that the witness was permitted to testify that the paper he found was rolled up like a bottle stopper and had the odor of kerosene on it, was also clearly competent. The paper fitting in the torn page was exactly the evidence admitted in the homicide trial of *S. v. Dixon,* 131 N. C., 811.

Exception 6 cannot be sustained. Evidence that a witness for the State was also a witness against the defendant in another case was not admissible to discredit him or to show bias.

Exceptions 7 and 8 do not require discussion.

Exception 9 was because evidence was admitted that the defendant's

husband, in her presence, "began to talk pretty ill." This was too indefinite to be ground of error; and besides, it being competent against her husband, who was codefendant, Rule 27 of this Court (174 N. C., 835) required that the evidence being "competent for some purposes, it is not error to admit it generally unless the appellant asks at the time of its admission that it should be restricted." The defendant was present at the time of the conversation, and in any view it does not appear that she was prejudiced by a conversation whose substance is not given.

Exception 13 is because the court charged the jury that where a wife commits a criminal act in the absence of her husband, there is no presumption that she acted under the influence or coercion of the husband, and the burden is on the State to satisfy the jury from the evidence that the defendant burned the barn, and said: "If you are so satisfied from all the evidence, it will be your duty to return a verdict of guilty against her; but if you are not so satisfied from all the evidence, it will be your duty to return a verdict of not guilty as to her. And if you should return a verdict of not guilty as to her, it would follow as a matter of course you would have to return a verdict of not guilty as to her husband." The defendant excepts because the judge did not use the expression "beyond a reasonable doubt," or "fully satisfied," but it appears in the record that the judge in that immediate connection told the jury in the charge, "You are sole judges whether or not the circumstances relied upon have been established to your satisfaction beyond a reasonable doubt," and at least four times in his comparatively short charge stated the rule of "reasonable doubt" twice before stating the contentions of the parties, and twice afterwards. A charge cannot be condemned because the judge did not repeat that phrase in a single detached sentence when it appears that he stated the required degree of proof was "beyond a reasonable doubt" clearly and distinctly.

Exceptions 14 and 15 are addressed to the part of the charge which merely stated the contentions of the State and was immediately followed by a full and careful statement of defendant's contentions.

Exception 15a. The defendant offered an affidavit for a continuance, and the State, to avoid a continuance, admitted that if the absent witness was present she would "testify to the fact." The defendant accepted the offer. The court told the jury that the State had not admitted that the proposed testimony was true, but had admitted only that the witness (if here) would testify to that fact. The defendant contends that this was error, and that the court should have charged that on this affidavit the facts therein set out were admitted to be true, and relies upon *S. v. Twiggs,* 60 N. C., 143. The judge stated the fact as it was, and if he had charged as the defendant contends would have stated the matter incorrectly. In *S. v. Twiggs, supra,* the judge required the affidavit of

defendant to be read and allowed the State to put on evidence, in reply to which the prisoner excepted. In this case the defendant introduced the affidavit and the solicitor consented merely to admit that if the witness were there she would "so testify." There was no exception. It rested in the sound discretion of the judge whether to permit the continuance or not, and the defendant saw fit to accept the consent of the solicitor as made.

The last exception is that the court charged as follows: "Evidence has been offered of the good and bad character of witnesses. It is competent and proper for you to take into consideration the characters which they have tried to prove. You have seen them on the witness-stand and heard them give the evidence, and it is your province to take into consideration their demeanor upon the witness-stand, the manner in which they conducted themselves, and it is for you to say whether or not their testimony has weight with you. This rule applies to witnesses which are offered by the State and witnesses which are offered by the defendant, and it is your province to judge their capacity to speak the truth—that is, of the knowledge they have about which they have testified—and their purpose to speak the truth, the motives and interest they have in the result of the verdict."

The defendant relies upon the use of the word "tried," but the charge is impartial as it applied equally to the witnesses on both sides, and the expression "the characters which they have tried to prove" means no more, taken with the context, than if the judge had said "offered evidence to prove." There is no implication that the offer had failed to prove the good or bad character of the witnesses on either side.

If the evidence which the jury have found to be true was correctly so found, there was no reasonable doubt of the guilt of the prisoner. The jury were the judges whether it produced that degree of conviction on their minds.

In the trial we find

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1919

SALLIE A. CRADDOCK v. DAVID O. BRINKLEY.

(Filed 19 February, 1919.)

1. Judgments—Consent—Actions—Motions in Cause—Husband and Wife—Insanity.

An action brought by the wife to set aside a compromise judgment concerning her lands, to which the husband was a party and agreed to by him at a time she was insane and confined in an asylum, with allegation of these facts, is a direct proceeding to set aside the judgment, and not a collateral attack thereon.

2. Judgments—Fraud—Independent Action—Motion in Cause—Court's Discretion—Same County.

An independent action is the proper remedy to set aside a judgment on the ground of fraud, and on any other ground it should be by motion in the cause; yet where both actions are brought in the same county the court may, in its discretion, treat the summons and complaint in the second action as a motion in the original one.

3. Husband and Wife—Actions—Joinder—Insanity of Wife—Judgments—Consent—Principal and Agent—Statutes.

The joinder of the husband in an action maintainable against the wife alone, Rev., 563 (4), though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purposes of the suit; this does not obtain if she is insane, and his consent in such case to the entry of a judgment affecting her lands is voidable, and she may thereafter move to have it set aside.

4. Husband and Wife— Actions— Married Women— Statutes— Guardian—Next Friend.

It is not required that the wife, as such, prosecute or defend an action concerning her lands by guardian or next friend. Rev., sec. 407.

5. Appeal and Error—Supreme Court—Counterclaim—Consent of Counsel—Judgments.

Where plaintiff's attorneys consent, in the Supreme Court, to a judgment as on a counterclaim, not pleaded or urged in the lower court, this entry may be made in the lower court when the certificate of the judgment on appeal is filed there.

BROWN, J., not sitting.

APPEAL by defendant from *Whedbee, J.*, at Special September Term, 1918, of WASHINGTON.

The plaintiff, a married woman, owned land adjoining the defendant. Prior to 1906, controversy arose as to the line of division between the two tracts and a suit was instituted in the name of herself and husband against the defendant. Summons was issued, but it does not appear that any pleadings were filed. At the time of the commencement of the suit in 1906 the plaintiff was insane. No next friend was appointed for her, and at Fall Term, 1906, of Washington, what purports to be a consent judgment was signed establishing the line, giving the defendant twenty acres of land, which the jury now find belonged to the plaintiff. The plaintiff at that time was insane and confined in an asylum, and it appears that the husband, after conference with defendant's attorney, accepted fifty dollars, in consideration of which the judgment was entered.

Small, MacLean, Bragaw & Rodman, Meekins & McMillan, and Z. V. Norman for plaintiff.

Ward & Grimes for defendant.

CLARK, C. J. The jury find that the plaintiff was insane and confined in an insane asylum at the time the former action was instituted, and also at the time the consent judgment was entered, and that the twenty acres in controversy are her property. The defendant enters two assignments of error:

1. That this proceeding cannot be maintained because it is a collateral attack upon the former judgment, and that plaintiff's remedy is by a motion in the cause.

2. That the judgment in the former action is an estoppel on the plaintiff, and conclusive, because the action was brought in the joint name of her husband and herself, and that he was her legal representative in the action.

As to the first proposition, this is not a collateral attack, but a direct proceeding to set aside the judgment. The insanity of the plaintiff and the invalidity of the judgment for that reason are alleged, and there are

both ground and prayer to set aside the judgment, and also a demand for the recovery of the property.

It is true that when the ground alleged for setting aside the judgment is not based upon fraud, the proper remedy is by motion in the cause, but we have no distinct forms of action now, and it has been held that when a party by mistake brings an independent action when his remedy is by motion in the original cause, the court may, in its discretion, treat the summons and complaint as a motion. *Jarman v. Saunders,* 64 N. C., 367. It is true that an independent action, when brought in another county, cannot be treated as a motion in the cause (*Rosenthal v. Roberson,* 114 N. C., 594), but that does not obtain here as the proceeding is in the same county.

As to the second point, the jury having found that the plaintiff was insane, she could not be represented by her husband, since even if she had been present in person or by counsel, the judgment would have been invalid. The judgment was not void, but voidable, as between the parties (*Thomas v. Hunsucker,* 108 N. C., 724), and on the finding of the jury was properly set aside. The same would have been true as to a deed executed by her. *Odom v. Riddick,* 104 N. C., 515, and cases cited in the Anno. Ed.

Revisal, 563 (4), expressly provides that judgment may be taken against a married woman, whether plaintiff or defendant, "in the same manner as against other persons," and we would not be considered as affirming the ruling (by a divided Court) in *McLeod v. Williams,* 122 N. C., 451, in which it was held that a wife would not be bound by her assent in person in open court to a compromise judgment in an action to which she is a party defendant, but we rest our decision upon the proposition that though when she and her husband sue or are sued jointly he is ordinarily to be taken as her authorized agent when she is not present in person or by counsel. *Smith, C. J.,* in *Vick v. Pope,* 81 N. C., 22; *Neville v. Pope,* 95 N. C., 346; *Grantham v. Kennedy,* 91 N. C., 148, and cases cited thereto in the Anno. Ed. In this case the jury having found that when the writ was issued by her husband in their joint names, and also when the judgment was taken the plaintiff was insane, it follows that he could not have been authorized to assent to the judgment as her agent, and the judgment was voidable in this proceeding. It was not necessary that the husband should be joined in the action, but being joined, *prima facie* he was acting as her agent. "In no case need she prosecute or defend by guardian or next friend." Revisal, 407.

Though there is no counterclaim set up in the answer, the plaintiff's counsel assets in this Court—to avoid the necessity of another action—that judgment may be taken against her for the fifty dollars paid her

husband by defendant in 1906, with interest thereon from date of such payment. This entry may be made in the court below when the certificate of this judgment on appeal is filed.

No error.

LINA RICE v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 19 February, 1919.)

Insurance, Life—Fraud—False Representations—Evidence.

The insured may not sustain his action to recover the premiums paid on her policy of life insurance for several years, upon allegation that the agent of the insurer had fraudulently misrepresented that this could be done after a period of twelve years, when her own evidence shows she and the agent read the policy together, and he suggested that she have others read and explain it to her, which she did, and continued to pay the premiums, etc., and the policy itself clearly and unambiguously stated that the premiums would only be returned within two weeks from its date if the insured should be dissatisfied therewith. *Hughes v. Ins. Co.*, 156 N. C., 592, cited and distinguished.

BROWN, J., not sitting.

APPEAL by defendant from *Devin, J.*, at the December Term, 1918, of BEAUFORT.

Two causes of action are stated in the complaint. The first alleges that the defendant issued to the plaintiff a policy of insurance on the third day of October, 1904, and that the plaintiff was induced to accept the policy and pay the premiums thereon by false and fraudulent representations of the agent of the defendant, that if she would pay the weekly premiums for a period of twelve years or more she could then get back all the premiums paid, and the second alleges the right of the plaintiff to have a paid-up policy of insurance issued to her.

The defendant denied that any false representations were made by its agent, but agreed to issue a paid-up policy as demanded in the second cause of action.

The action was tried before a jury on the first cause of action, and the jury returned the following verdict:

1. Did defendant's agent at the time of delivering the policy of insurance and as a part of the transaction of its execution falsely and fraudulently represent to the plaintiff that if she would take the policy and pay the premiums for twelve years she would, under the terms of the policy, be entitled to receive her premiums if she so elected? Answer: "Yes."

2. If so, was the plaintiff reasonably deceived thereby and caused to rely on said statement and unable to understand from the policy that the representation was false? Answer: "Yes."

3. Did the defendant's agent wrongly and incorrectly read the policy to the plaintiff, and if so, was she deceived thereby and caused to take out the policy? Answer: "Yes."

4. Did the plaintiff more than three years prior to the commencement of the action discover, or would she in the exercise of reasonable care have discovered, that any statement alleged to have been made by the agent that she could get her premiums back at the end of twelve years was untrue and contrary to the provisions of the policy? Answer: "No."

5. What damage, if any, is plaintiff entitled to recover? Answer: "$312."

Judgment was entered in favor of the plaintiff, and the defendant appealed, presenting in several exceptions the contention that the plaintiff was not entitled to recover upon her own evidence.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. The policy issued by the defendant to the plaintiff is singularly free from ambiguous and uncertain language, and it contains express provision that it may be surrendered within two weeks of its date and the premiums paid recovered if not satisfactory, thus affording opportunity to become familiar with its terms. The plaintiff testified that the agent who sold the policy read it to her, and she does not say it was read incorrectly. She also says she did not think the agent understood the policy himself, and that he told her to get others to read it for her. He "didn't do anything to keep me from reading it, and he suggested to me to get other people to read it to me." The plaintiff can read and write. She read the policy and others read it to her. Seven months after the policy was issued she told the agent she did not believe it was "any good."

In 1908, four years after the date of the policy, she demanded of the defendant the return of the premiums paid, claiming that the agent of the defendant represented to her that she could get her money back at any time, and this demand was refused, and in 1912, desiring to change the beneficiary, she had Mr. Cave, whom she said she had found correct in all his dealings, to read the policy to her. She continued to pay the premiums until 1916. These facts are disclosed by the evidence of the plaintiff, and they preclude a recovery upon the ground of false representations, because an investigation of the contents of the policy was not only not prevented, but was invited, and the means of information were equally open to both parties.

"The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied and by which he was actually misled to his injury. A court of equity will not undertake any more than a court of law to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made and acts upon the information thus obtained." *Slaughter's Admr. v. Gerson,* 80 U. S., 383.

"The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged, the facts sustaining it must be clearly made out. The representation must be in regard to material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. . . . If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations." *Southern Development Co. v. Silva,* 125 U. S., 247.

"The true rule is stated to be that the seller is liable to an action of deceit if he misrepresent the quality of the thing sold in some particulars in which the buyer has not equal means of knowledge with himself, or if he does so in such manner as to induce the buyer to forbear making the inquiries which for his own security and advantage he would otherwise have made. 2 Kent's Com., 487. The misrepresentation must be of a kind, the falsehood of which was not readily open to the other party. Per *Taylor, C. J., Fagan v. Newsom,* 1 Dev., 22." *Saunders v. Hatterman,* 24 N. C., 35.

These authorities are reviewed in *County v. Construction Co.,* 152 N. C., 29, and the principles stated as follows: "The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributed to indifference or credulity;

nor will industrious activity in other directions, to the neglect of such means, be of any avail. *Andrus v. Smelting and Refining Co.,* 130 U. S., 643.

"If the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. *Farrar v. Churchill,* 135 U. S., 616.

"Our cases are in perfect accord with those decisions and the great weight of authority upon the important question now before us. We said in *Fagin v. Newsom,* 121 N. C., 22: 'It is a very reasonable principle that the purchaser should not be entitled to an action of deceit if he may readily inform himself as to the truth of the facts which are misrepresented.' See, also, *Cash Register Co. v. Townsend,* 137 N. C., 658; *Lytle v. Bird,* 48 N. C., 225; *Saunders v. Hatterman,* 24 N. C., 32."

At the last term it was held in *Arndt v. Ins. Co.* that one who could read and write and had kept a policy without reading it, and had paid the premiums for nine years, could not recover the premiums paid upon the ground that he had been induced to accept the policy by the fraudulent representations of the agent of the defendant, and the facts in this case are stronger against the plaintiff because here she read the policy herself, had others upon whom she relied to read it for her, shows that she did not rely upon the representations within seven months after the policy was issued, knew that in four years that the company had repudiated the alleged representations by refusing to return her money, and thereafter continued to pay the premiums for a period of twelve years.

We are, therefore, of opinion that the plaintiff cannot recover upon the first cause of action, and that she is entitled to have the defendant issued to her a paid-up policy, which it has agreed to do.

The facts in the case of *Hughes v. Ins. Co.,* 156 N. C., 592, are entirely different from those in this case. In the *Hughes case* the plaintiff could not read or write. The policy was read and explained by the agent, no one else read it to him, and the agent did not suggest that the insured should make further investigation himself or get others to do so for him.

Reversed.

JOSEPH ASHE v. NANCY PETTIFORD ET AL.

(Filed 19 February, 1919.)

Evidence— Declarations— Traditions— Pedigree— Relationship— Title—Descent and Distribution—General Reputation—Appeal and Error.

Where declarations and tradition in a family tend to prove pedigree, on the question of title to lands by descent, they may be received in evidence only when the declarant is dead and the declarations have been made *ante litem motam* by those connected with the party to whom they relate by blood or marriage and made under such circumstances as to show it to be natural and likely, from their domestic habits, that they were speaking the truth and could not have been mistaken; and the admission of testimony, otherwise, of the general reputation as to such relationship constitutes reversible error.

BROWN, J., not sitting.

ACTION tried before *Whedbee, J.*, and a jury, at September Special Term, 1918, of WASHINGTON.

The action was brought to recover possession of a tract of land on Welch's Creek containing sixty acres. Plaintiff claimed the land by collateral descent from Martha A. Pettiford, who he alleged was his sister, which allegation the defendants denied, so that the sole question was whether the relation of brother and sister existed between the plaintiff and Martha A. Pettiford. In order to show that Martha was not the sister of the plaintiff, the defendants asked Henry Pettiford, one of their witnesses: "What relation, by general reputation in the community, was there between Joe Ashe and Martha A. Pettiford?" The plaintiff entered an objection to the question, which was overruled by the court, and plaintiff excepted and now assigns the ruling as error. The witness answered that they were no kin, nor did they have the same father or mother, Martha's father being a man by the name of Yates, and her mother was Mary Yates, while Joe Ashe's mother was named Sylvania. The testimony of the witnesses in this connection tended to prove that Joe Ashe, the plaintiff, and Martha A. Pettiford were not brother and sister or so related as to make the plaintiff the heir of Martha, and as such entitled by descent to the land which belonged to her.

There was other testimony of the reputation in the Pettiford family as to the relation between Joe Ashe and Martha Pettiford and as to other matters bearing upon the question, but we need not consider it.

There was verdict and judgment for defendant, and plaintiff appealed.

Small, MacLean, Bragaw & Rodman, P. H. Bell, and Z. V. Norman for plaintiff.

L. W. Gaylord and Ward & Grimes for defendant.

WALKER, J., after stating the case: We are of the opinion that error was committed in overruling the objection to testimony of the witness Henry Pettiford as to the general reputation of the pedigree or genealogy of Joe and Martha, as this must be shown by reputation in the family of the parties concerned or by declaration of deceased members of such family, and not by general reputation in the community. The error was substantial and prejudicial.

"It was held in *Kaywood v. Barnett,* 20 N. C., 88, that in order to warrant the admission of declarations relating to pedigree, it is essential, first, that the parties who made the declarations be proved to be dead; secondly, that the declarants were likely to know the facts. The tradition must, therefore, be derived from persons so connected with the family that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken," citing 2 Starkie on Ev., 604, 605.

A question exactly like the one now being considered was asked in *Erwin v. Bailey,* 123 N. C., 628, 634. To make the analogy between the two perfectly clear we quote literally from the opinion of the Court in that case: "The defendants proposed to prove that there was a general reputation that plaintiff was not the child of Cæsar. This evidence was objected to and ruled out, and defendants excepted. We do not think there was any error in the court's sustaining plaintiff's objection and in overruling the exceptions of defendants to this evidence. The case of *Woodward v. Blue,* 107 N. C., 407, comes nearer sustaining defendant's exceptions than any case called to our attention; and that case does not do so, as we think."

This kind of proof is a well-known exception to the general rule excluding hearsay evidence, and it rests in part on the supposed necessity of receiving such evidence to avoid a failure of justice, and in part on the ground that individuals are generally supposed to know and to be interested in those facts of family history about which they converse, and that they are generally under little temptation to state untruths in respect to such matters which might be readily exposed. 2 Jones on Evidence (Ed. of 1913 by Horwitz), sec. 312, pp. 704, and 705.

Lord Chancellor Eldon once said, in part, that declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. In other words, the law resorts to hearsay evidence in cases of pedigree upon the ground of the interest in the declarations of the person from whom the descent is made out and their consequent interest in knowing the con-

nections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question.

From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is tradition in the family, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. It is not every statement or tradition in the family that can be admitted in evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. 2 Jones on Evidence, 705, 706; *Whitelock v. Baker,* 13 Vesey, 514; *Fulkerson v. Holmes,* 117 U. S., 389, and 16 Cyc., 1225 to 1235, where the subject is fully discussed with a great many authorities in the notes presenting and illustrating manifold features of the question.

It was stated by *Justice Woods* in *Fulkerson v. Holmes, supra,* that "The fact to be established is one of pedigree. The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity, for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Taylor Evidence, sec. 635.

"Traditional evidence is, therefore, admissible. *Jackson v. Willson,* 9 Johns., 92; *Jackson v. Browner,* 18 Johns., 37; *Jackson v. King,* 5 Cowen, 237; *Davis v. Wood,* 1 Wheat., 6.

"The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Jewell v. Jewell,* 1 How., 219; *Blackburn v. Crawford,* 3 Wall., 175; *Johnson v. Lawton,* 2 Bing., 86; *Vowels v. Young,* 13 Ves., 147; *Monkton v. Attorney-General,* 2 Russ. & Myl., 159; *White v. Strother,* 11 Ala., 720.

"A qualification of the rule is that before a declaration can be admitted in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton v. Attorney-General,* 2 Russ. & Myl., 156; *Attorney-General v.*

Kohler, 9 H. L. Cas., 660; *Rex v. All Saints,* 7 B. & Cr., 789. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy."

McKelvey on Evidence (2d Ed.), 271, says that where the question of pedigree is one of some years back it is generally the case that there is no living witness who has personal knowledge of the facts, and it therefore becomes necessary, if any proof at all is to be had, to resort to what may be said to be the reputation in the family concerning the facts—that is, what has been handed down from father to son, or to other form of hearsay evidence in the family. The rule is very strict as to the degree of relationship which must exist in order to render the declaration admissible. Formerly it was thought that it should be confined to those connected by blood only with the family to which the pedigree related, but subsequently it became established that declarations of a husband or wife should be admitted, citing *Shrewsbury Peerage case,* 7 H. L. Cases, t, at 26, and *Jewell's Lessee v. Jewell,* 1 How. (U. S.), 219, 231 (11 L. Ed., 108).

But it has been held that these are qualifications as to the competency of a husband's declarations. *Harland v. Eastman,* 107 Ill., 535. See, also, *Conn., etc., Ins. Co. v. Schwenk,* 94 U. S., 593; *Eastman v. Martin,* 19 N. H., 152; *Carnes v. Crandall,* 11 Iowa, 377.

A further condition of the admissibility of declarations of this nature is that they must have been made before the beginning of the controversy in which the question of pedigree arises. A common form of expressing this condition is that the declarations must have been made *ante litem motam.* This does not mean, however, that it is sufficient if they have been made before the commencement of the actual suit. As a matter of fact, they must have been made before the existence of the controversy which has given rise to the suit in order to be admissible. This is a rule of fairness, and is a necessary precaution against unreliable and prejudiced statements made as the result of sympathy or passion, or other feeling, or with a view to their subsequent use in litigation. McKelvey on Evidence (2d Ed.), 280, 281; *Stein v. Bowman,* 13 Peters (U. S.), 209, 220 (10 L. Ed., 129); *People v. Fulton Fire Ins. Co.,* 25 Wend. (N. Y.), 205, 209; *Northrop v. Hale,* 76 Me., 306; *Barnum v. Barnum,* 42 Md., 251, 304.

It was held in *Stein v. Bowman, supra,* that the testimony of a witness "that he had been in Hanover, Germany, last summer, and there heard from many old persons of whom he inquired that the plaintiff was the brother of Nicholas Stone, deceased," was excluded on the ground that the declarations were not of "members of the family who may be supposed to have known the relationships which existed in its different

branches." 2 McKelvey on Ev. (2d Ed.), 273, note 37; *Chapman v. Chapman,* 2 Conn., 347.

We have thus stated, in a casual way, the reasons underlying this exception, as it is called by some authorities, to the general rule concerning hearsay. It appears from this statement that public opinion in the community to show pedigree or genealogy, or the relation of one person to another, is not admissible. It would violate the fundamental theory upon which the exception is based. *Judge Elliott,* after stating that only one State has ever approved such evidence, assigns the reasons why it should not be admitted in this language: "The exception to the general rule of evidence, the admissibility of declarations, is confined, first, to the declarations of persons deceased, for the reason that if living they should be called as witnesses; second, it is generally confined to the declarations of relatives, because they are likely to be acquainted with the pedigree of each other; and if the exception was extended to strangers, before the testimony could be admitted, it would be necessary to prove the degree of intimacy, the opportunities for knowledge, the source of the information, etc., which would render the exception uncertain and difficult to apply. But in Tennessee it was held that the declarations are not to be confined to members of the family, and even public repute in the community is admissible." Elliott on Ev., sec. 2197, p. 688.

The cases in the single State mentioned do not all refer to general reputation in the community, but only one of them, and this is not supported by the only authority cited for the statement, which was based on special facts, and the testimony offered was more than mere general repute. Even this decision was met by a very strong dissent from *Judge Spencer,* one of the ablest and most distinguished judges in the State where it was rendered, and is contrary to all the authorities. But however this may be, we have shown by cases already cited that this Court has distinctly rejected it as opposed to the principles which justify the exception itself. It would be unsafe and too wide a departure from the ordinary rule as to hearsay to establish pedigree by any such standard of proof.

We have designated hearsay as to pedigree an exception to the general rule as to such evidence, but Mr. Greenleaf does not so treat it, but calls it original evidence. It does not follow, he says, because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases that the very fact in controversy is, whether such things were written or spoken, and not whether they were true; and in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy. In such cases it is obvious that the writings or words are not

within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. 1 Greenleaf on Ev., sec. 100. The learned author then undertakes to enumerate a number of instances in which what may, in common parlance, be termed hearsay, is original and competent evidence. Among these he includes "evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath." 1 Greenleaf Ev., 101. "To this head," he adds, "may be referred much of the evidence sometimes termed hearsay, which is admitted in cases of pedigree. . . . And general repute in the family, proved by the testimony of a member of it, has been considered as falling within the rule." Other pertinent statements as to proof of pedigree may be found in the same volume, at pp. 101, 104.

There are other exceptions to the testimony which raise very serious questions, but we do not deem it necessary to discuss them, as perhaps they may be avoided hereafter or presented in such a different form as to materially change even the substance of them. Besides, there is scarcely any evidence that the declarations or reputation originated *ante litem motam,* and there is grave doubt whether the declarations came from those qualified to speak.

We have discussed the rule as to pedigree more fully than we would otherwise have done, for the reason that it does not seem to have received very much consideration before, and because of the great and important interests dependent upon or which may be affected by it.

There must be another trial because of the error indicated.

New trial.

J. E. ALEXANDER ET AL. v. RICHMOND CEDAR WORKS.

(Filed 19 February, 1919.)

1. Deeds and Conveyances—Tenants in Common—Limitation of Actions—Judicial Sales—Adverse Possession—Color of Title.

The construction placed upon the deed of a tenant in common who attempts to convey the entirety, that his grantor takes only the interest of the grantor in the lands, and that the conveyance is not color of title to the whole tract, has not application to a deed executed under judicial proceedings which purports to sell and convey the entirety, and where some of the tenants in common had been made parties to the proceedings under which the court ordered the sale; and sufficient adverse possession thereunder for seven years or more will ripen the title in the grantee.

2. Same—Rules of Property.

The rule in this State that a deed to lands held in common, made under a judicial sale, wherein some of the tenants in common have been made

parties, will constitute color of title to the entire tract, is one of property concerning which our courts will not follow the contrary doctrine elsewhere prevailing.

3. Limitations of Actions—Adverse Possession—Title.

It is not required that adverse possession, to ripen the title to lands under "color," should have existed during the period next preceding the commencement of the suit if such title had thereby at any time prior thereto, and this title will support a recovery unless subsequent to its vesting it had in some way been divested; nor is it necessary that such possession should have been unceasing if it is sufficient to warrant the inference that the actual use and occupation have extended over the statutory period.

4. Same—Character of Possession—Color of Title.

The character of adverse possession required to ripen title to lands under "color" of a paper-writing sufficiently describing them is the notorious, continuous and exclusive use thereof, for the statutory period, that the land is susceptible of in its present condition; and in instances of swamp lands, which could only be used for the purpose of cutting and removing trees therefrom, the cutting and removing of the trees with such frequency and regularity for the required period, as to give notice to the public owner of the paper title, that the claimant was claiming the land as his own, and to expose him to suits by the true owner is sufficient.

5. Evidence—Judgment Roll—Deeds and Conveyances—Tenants in Common—Judicial Sales—Color of Title.

Where a deed to lands held in common, made under a judicial sale, is relied upon as color of title the judgment roll in the proceedings, disclosing of record that the petition had been filed, sale ordered and confirmed, directing the deed to be made, is sufficient evidence thereof, though some of the essentials must be inferred from the actual existence of the others, as shown in the roll and substantiated by the documents themselves and entries on the minutes of the court.

6. Evidence—Adverse Possession—Notice.

Evidence that the owners of the paper title to lands permitted the one claiming by adverse possession under "color" to use the lands under claim of ownership for seven years, with both actual and constructive notice thereof, without objection, is competent as some evidence upon the question of such adverse claim.

7. Trials—Opinion of Judge—Appeal and Error—Harmless Error.

A remark of the trial judge, in the presence of the jury, upon the argument of counsel, as to the sufficiency of the evidence is not objectionable as an expression of his opinion, and if otherwise it is without prejudice when it appears that he did not finally adopt his first impression, and sufficiently instructed the jury as to the law.

8. Appeal and Error—Objections and Exceptions—Instructions.

Exception to a charge of the court which was free from error and which covered the case and was correct in principle, that it was not sufficiently full and explicit, without any special request for instructions in the respects complained of, will not be considered on appeal.

9. Appeal and Error—Objections and Exceptions—"Contentions."

Objection that the trial judge did not correctly state the appellant's contention should be made at the time, and otherwise it will not be considered on appeal.

BROWN, J., not sitting.

ACTION tried before *Bond, J.*, and a jury, at November Term, 1918, of TYRRELL.

Plaintiffs alleged and offered evidence tending to show that this land lay within the boundaries of a grant to Josiah Collins, and that a chain of title connected said Collins with Solomon Hassell; that Solomon Hassell conveyed this land to Jesse Alexander in 1813, and that Jesse Alexander died leaving five children: (1) Abner Alexander, who died intestate without issue; (2) Joseph Alexander, ancestor in blood of some of the plaintiffs; (3) Martha Spruill, ancestor in blood of the remaining plaintiffs; (4) George Alexander, who conveyed his right in the land in controversy to Thomas Alexander; (5) Thomas Alexander, who conveyed his right and the right acquired from his brother George to one William Cahoon, whose title, plaintiffs alleged, had been acquired by defendant.

Plaintiffs further alleged that their interests, together, equaled one-half, and that the defendant owned the other half; that the land could not be actually divided, and that a sale for partition was necessary.

Defendant admitted that it had acquired the title of William Cahoon, but pleaded sole seisin and averred that it had acquired a good title for the entire tract by adverse possession.

Upon the trial it developed that there lay within the outer boundaries of the tract of land described in the complaint several other tracts of land, referred to upon the trial and in the first issue and in the judgment rendered as (1) A. C. Sawyer to F. C. Patrick; (2) Allen Cahoon, Nos. 1 and 2; (3) Armstrong Tract No. 1; (4) Kemp No. 1; (5) Kemp No. 2; (6) Armstrong No. 2 Swamp; (7) Armstrong (3, 4, and 5). These tracts are the ones named in red ink on the blueprints, and the correctness of their location in relation to the boundaries of the tract of land described in the petition was conceded by plaintiffs.

In order to show title in itself for these several tracts, the defendant offered grants prior to the Josiah Collins grant aforesaid, and deeds to itself foreign to the title under which the plaintiffs claimed, and evidence of possession of each of said tracts by it and its ancestors in title.

Plaintiffs finally, at the conclusion of the testimony, in open court, disclaimed title to any of the tracts referred to in the first issue and admitted that they could not and did not claim title to any of said tracts, and thereupon this phase was eliminated from the case. The court, with the consent of plaintiffs, framed two issues, the first of which

involved the tracts of land above described, which the court answered in accordance with plaintiffs' admission that they had no title thereto; the second of which issues involved the title to the remainder of the land described in the petition outside of the boundaries of the above tracts.

For the purpose of showing sole title in itself for the lands referred to in the second issue (that is, that portion of the land described in the petition outside of the tracts referred to in the first issue), the defendant offered:

(1) Deed from George H. Alexander to Thomas H. Alexander.

(2) Deed from Thomas Alexander to William Cahoon, in 1833, which purported to convey in fee, with warranty, the entire tract of land described in the petition.

(3) Deed from William Cahoon to James S. Cahoon, in 1839, which purported to convey in fee, with warranty, a tract of land which included within its boundaries the tract described in the petition.

(4) Petition filed by Jordan L. Jones, administrator of James S. Cahoon, in 1849, in court of pleas and quarter sessions, asking for a sale of his intestate's lands to make assets, with evidence of the clerk of the court that a diligent search of his office did not show any other papers in his office relative to said proceeding.

(5) Certain entries on the appearance docket for January Term, 1849, of court of pleas and quarter sessions of Tyrrell County.

(6) An account of the lands of Jordan L. Jones sold by his administrator.

(7) Deed from Jordan L. Jones, administrator, to Charles McCleese, which purported to convey in fee the entire tract of land described in the petition. This deed recites that it was made pursuant to a sale by virtue of a petition filed by grantor at January Term, 1849.

(8) Partition proceeding of Martha Sawyer et al. v. C. E. Tamem et al. The pleadings alleged that the parties to this proceedings were the owners in fee simple of the entire tract of land in controversy, and the court ordered the sale of the said tract and appointed M. Majette commissioner. The sale was made and duly confirmed and Majette, commissioner, was ordered to make deed to C. R. Johnson, the purchaser.

(9) Evidence tending to show that the parties to said proceedings were all the heirs at law of Charles McCleese.

(10) Deed from M. Majette, commissioner, to C. R. Johnson (general manager of the Richmond Cedar Works in North Carolina), in 1893, made pursuant to the last-mentioned special proceeding and purporting to convey in fee several tracts of land, the second of which included the land now in controversy.

(11) Deed from C. R. Johnson and wife to Richmond Cedar Works,

in 1905, which purported to convey in fee several tracts of land, the third of which included the land now in controversy. This deed recites that this tract and one other were bought and held by said Johnson for the Richmond Cedar Works.

(12) Evidence of adverse possession set out in the record.

The principal contentions of appellants at the trial in the lower court were: (1) That they and defendant, and its ancestors in title, were tenants in common, and that, therefore, seven years adverse possession was not sufficient to bar their rights, and (2) that if seven years possession was sufficient, there was no evidence of such possession fit to be considered by the jury.

Defendant, appellee, contends, first, that it is now settled that adverse possession by defendant, or those under whom it claimed, for seven years is a complete and perfect defense to plaintiff's action.

Assuming, as it further says, for the sake of argument, that some eighty years ago, when Jesse Alexander died, his children became tenants in common of the land in controversy, and that the effect of the conveyance from George H. Alexander to Thomas H. Alexander was only to convey an undivided one-fourth interest in the *locus in quo,* and that the effect of the conveyance from Thomas Alexander to William Cahoon and from William Cahoon to James S. Cahoon, although they purported to convey the entire interest, was only to convey a one-half interest to James S. Cahoon and to create him a tenant in common with the other heirs of Jesse Alexander, yet when the court, upon the petition of the administrators of James S. Cahoon, ordered the sale of the entire land and it was sold to Charles McCleese and deed was made to him, and when the court later, in the partition proceeding brought by the heirs at law of Charles McCleese, purported to order the sale of the entire tract, and upon the sale being reported to it entered an order of confirmation and directed deed to be made to the purchaser, who paid the purchase money, either or both of these judicial proceedings and the deeds made under either or both of them, were equivalent to an actual ouster of any other tenants in common, constituted color of title to the whole tract, and seven years adverse possession thereafter was sufficient to bar the entry of any of the plaintiffs, even admitting them to have been tenants in common.

There were exceptions to the charge of the court which will be noticed hereafter.

The verdict was as follows:

1. What interest, if any, do the plaintiffs J. E. Alexander and others own in that portion of the lands described in the complaint or petition in this cause covered by the various tracts platted on map used in this trial, marked, first, A. C. Sawyer to F. C. Patrick; second, marked Allen

Cahoon, Nos. 1 and 2; third, marked Armstrong Tract No. 1; fourth, tract marked Kemp No. 1; fifth, tract marked Kemp No. 2; sixth, marked Armstrong No. 2, swamp; seventh, tract marked Armstrong Nos. 3, 4, and 5? Answer: "None" (by consent of plaintiffs.)

2. What interest, if any, do the plaintiffs J. E. Alexander and others own in that portion of land described in complaint or petition in this cause outside of tracts platted on map used in this trial and referred to in issue 1 by numbers, first, second, third, fourth, fifth, sixth, and seventh? Answer: "None."

Judgment upon the verdict and plaintiffs appealed.

A. L. Whitley and Aydlett, Simpson & Sawyer for plaintiffs.
J. Crawford Biggs and Thompson & Wilson for defendant.

WALKER, J., after stating the case: We held in *Roper Lumber Co. v. Richmond Cedar Works,* 165 N. C., 83, that there is color of title, not where a deed is executed by one tenant in common, which purports to convey the entire interest, the grantor having less than an entirety, but where a deed is executed under a judicial proceeding which purports to sell and convey an entirety, and where some of the tenants in common had been made parties to the proceeding under which the court ordered the sale. Discussing this point, we said: "This Court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which the tenants are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case twenty years of adverse possession under a claim of sole ownership is required to bar the entry of other tenants under the presumption of an ouster from the beginning raised thereby." *Cloud v. Webb,* 14 N. C., 317; *Hicks v. Bullock,* 96 N. C., 164; *Breeden v. McLaurin,* 98 N. C., 307; *Bullin v. Hancock,* 138 N. C., 198; *Dobbins v. Dobbins,* 141 N. C., 210, and cases cited.

We are not inadvertent to the fact that this State stands alone in the recognition of the principle, the others holding the contrary, that such a deed is good color of title (1 Cyc., 1078 and notes); but it has too long been the settled doctrine of this Court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to the technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has within recent years been thoroughly sanctioned by the Court.

"Where less than the whole number of tenants join in a proceeding to sell the common estate for partition, and the same is sold, a deed made under order of the court to the purchaser is color of title, and seven years adverse possession thereafter by him under the deed will bar the cotenants who were not parties." *Amis v. Stephens,* 111 N. C., 172; *McCulloh v. Daniel,* 102 N. C., 529; *Johnson v. Parker,* 79 N. C., 475.

It will be found in the case first cited that there were tenants who were not made parties to the proceeding at law, and yet they were held to be barred by the adverse possession of seven years; and this was because the Court attached importance to the fact that the deed had been made under a decree in a judicial proceeding which closely resembled one made by a stranger to the title held by the cotenants. Only a part of the estate held in common was sold for partition, but the parties to the proceeding claimed the entirety in that part, or purparty, as it is technically called. In that case the Court said: "In deciding this question, though, the proceeding at law is to be regarded as having the same force and effect as a deed of one not connected with the tenancy would have, it purports to sever the relation of all the cotenants, whether it does so in law or not at the time, as against those tenants not made parties to it." And further, "The jury have found that plaintiff has had sufficient adverse possession of the land in dispute for seven years under color to bar the defendant's right, if they ever had any; and as the State has parted with the original title, judgment was properly entered in favor of the plaintiff upon the verdict." This decision leaves nothing to be said in favor of appellants' contention upon this point.

The second position taken by the plaintiffs is that there was no evidence of adverse possession fit to be considered by the jury. This involves the inquiry as to what is adverse possession necessary to ripen title. The possession need not have been during the period next preceding the commencement of the suit; but if the title ripened by adverse possession at any time prior thereto, it will be sufficient for a recovery, unless subsequent to its vesting it had in some way been divested. *Christenbury v. King,* 85 N. C., 229. The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period. *Berry v. McPherson,* 153 N. C., 6.

Judge Bond charged the jury that possession is the making that use of land of which it is susceptible in its present condition; for example, cutting timber from timber land, kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own, and that it is done in such a way as to constantly expose the party to a suit by the true owner is sufficient if done for the time required by law to ripen the color into a good title.

Occasion trespasses will not do. The acts must be such as at all times to subject the party doing the acts to an action at the instance of the true owner. Seven years possession under color of title before suit is begun, under known and visible lines and boundaries adversely, notoriously, continuously and exclusively, will ripen title in the parties having such possession. Plaintiffs certainly could not complain of this instruction, as it is sustained by all the authorities.

In determining the question of adverse possession, Mr. Wood says that the jury may take into consideration the nature and situation of the land, the using of it in the ordinary way by the grantees to whom it was conveyed, and the placing of the deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and other such facts and circumstances may be considered by them in connection with other acts denoting a claim to it, and the exercise of dominion and ownership over it. Wood on Limitations, sec. 268, p. 569.

What is sufficient to constitute this actual possession depends upon the character of the land and also the circumstances of the case. It involves, as a general rule, the doing of acts of ownership on the land sufficiently pronounced and continuous in character to charge the owner with notice that an adverse claim to the land is asserted. The question whether, in any particular case, there was an actual and adverse possession of the land is usually one of fact for the jury under the instructions of the court. Tiffany Real Property, 1007.

A standard author has said: Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits of which it is susceptible. This dominion may consist in and be shown by a great number and almost endless combination of acts, and where the statute of limitations has not designated certain things as requisites the law has prescribed no particular manner in which possession shall be maintained and made manifest. Nor, on the other hand, has the law attempted to lay down any precise rules by which the sufficiency of a given set of facts to constitute possession may be determined. It is ordinarily sufficient, if the acts of ownership are of such nature as the claimant would exercise over his own property and would not exercise over another's. Whether there has been sufficient adverse possession to ripen title is a mixed question of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of land, and the purpose for which it is adapted and for which it has been used. All these circumstances must be taken into consideration by the jury, whose peculiar province it is to pass upon the question. The only rule of general appli-

cability is that the acts relied upon to establish such possession must always be as distinct as the character of the land reasonably admits of and be exercised with sufficient continuity to acquaint the true owner with the fact that a claim of ownership, in denial of his title, is being asserted. 1 Cyc., pp. 983, 984; 2 C. J., pp. 54, 55.

As the question still appears to be misunderstood, and is frequently the subject of contention, it may be well to state the principles settled by this Court in former cases. Says *Ruffin, C. J.:* I think the rule is, that exercising that dominion over the thing and taking that use and profit which it is capable of yielding in its present state is a possession. It is all that can be done until the subject itself shall be changed. It is like the case stated in the books of cutting rushes from the marsh. This is sufficient, though it might appear that dikes and banks would make the marsh arable. *Simpson v. Blount,* 14 N. C., 36.

And *Judge Gaston:* Entering upon, ditching and making roads in a cypress swamp, and working timber into shingles, was sufficient possession, if continued for the requisite time, to ripen a defective title into a perfect one. *Tredwell v. Riddick,* 23 N. C., 56.

And again, by *Ruffin, C. J.:* The occupation of the pine land by annually making turpentine on it is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title; and in this opinion the *Chief Justice* calls attention to the fact that making turpentine from the trees is notice to the true owner, because it is necessarily visible, and the trees are boxed and the sides of the trees are scraped with a round hack, making the work easily visible to the eye. It was, therefore, held that occupation of pine land by annually making turpentine on it is such an actual possession which will in time mature the title against a constructive possession by one claiming merely under a superior paper title. The leading idea is that there shall be notice to the world, so that any one claiming adversely may have an opportunity to assert his title. *Moore v. Thompson,* 69 N. C., 121.

The Court held in *Britton v. Daniels,* 94 N. C., 786, that the erection of a spring-house and the use of a spring was sufficient adverse possession of a fifty-acre tract of land on which the spring was located. See, also, *Staton v. Mullis,* 92 N. C., 624, 631. It has further been said that the test of the sufficiency of the possession to fully mature title depends upon the question of whether a right of action had existed for the statutory period, when the suit was instituted, in favor of the parties against whom the benefit of the lapse of time is claimed. *Everett v. Newton,* 118 N. C., 923.

In *Coxe v. Carpenter,* 157 N. C., 557, the evidence tended to show that the land was only fit for use as timber land, and that Colonel Coxe

did not clear any of the land, but he and his tenants every year cut timber from the land to manufacture into lumber and also for firewood and house bote, roads were used and new ones laid out for the purpose of using the land in its then state and condition. In the opinion, the Court said: "There is no doubt but that the possession, if adverse, was open, visible, notorious and continuous, and no owner of land could have failed to take notice of it as an assertion against his title from the very beginning. There was also evidence that the plaintiffs and those under whom they claimed had possession of the land for more than seven years. We are of the opinion that there was sufficient proof of facts showing adverse possession, and the case was properly submitted to the jury for their consideration." The Court quotes from a former case to the effect that possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners and were not pillaging as trespassers. *Berry v. McPherson,* 153 N. C., 4.

We held in *Locklear v. Savage,* 159 N. C., 238: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner," citing *Loftin v. Cobb,* 46 N. C., 406; *Montgomery v. Wynns,* 20 N. C., 527; *Williams v. Buchanan,* 23 N. C., 535; *Burton v. Carruth,* 18 N. C., 2; *Gilchrist v. McLaughlin,* 29 N. C., 310; *Bynum v. Carter,* 26 N. C., 310; *Simpson v. Blount,* 14 N. C., 34; *Tredwell v. Reddick,* 23 N. C., 56. That decision has been cited and approved in the following cases: *Green v. Dunn,* 162 N. C., 343; *Locklear v. Paul,* 163 N. C., 338; *Christman v. Hilliard,* 167 N. C., 7; *Reynolds v. Palmer, ib.,* 455; *Horton v. Jones, ib.,* 667; *Lumber Co. v. McGowan,* 168 N. C., 87; *McCaskill v. Lumber Co.,* 169 N. C., 25; *Stallings v. Hurdle,* 171 N. C., 5; *Cross v. R. R.,* 172 N. C., 122, 125; *Holmes v. Carr, ib.,* 215; *Kluttz v. Kluttz, ib.,* 623; *Richmond Cedar Works v. Pinnix,* 208 Fed. Rep., 785 (op. by *Connor, J.*), and more recently in *Waldo v. Wilson,* 174 N. C., 626, where *Justice Brown* thus applies the rule: "There is evidence of an actual occupancy, *possessio pedis,* of a very small part of 6317, which defendant undertakes to explain, but that is a question for the jury. The adverse and unexplained possession of so small a part may not give

title to the whole tract, but coupled with all the other evidence in the record we think, under our decisions, that, taken as a whole, the evidence is sufficient to go to the jury that they may, under a correct charge, draw their own conclusions from it," citing *Locklear v. Savage,* 149 N. C., 236; *McLean v. Smith,* 106 N. C., 172; *Hamilton v. Icard,* 114 N. C., 538; *Bryan v. Spivey,* 109 N. C., 67; *Osborne v. Johnson,* 65 N. C., 26; *Lenoir v. South,* 32 N. C., 241; *Christman v. Hilliard,* 167 N. C., 7.

The plaintiffs contend, though, that there was not sufficient evidence of adverse possession by the defendants. It would be vain and useless, and would serve no good purpose, to review the testimony upon this question in detail. We have examined it carefully and have concluded that there is ample evidence to establish all the elements required to show such an adverse possession as will bar the true owners' right of entry and transfer the proprietorship to the disseisor. The statute of limitations, while it is always destroying titles, is also constantly building them up. It has been well said that where an adverse relation is fixed, and continues for the required period, time covers the transaction as with a mantle of repose. 18 Wallace (U. S.), 493; 25 Cyc., 1168 and note 61. It is truly a statute for the quieting of titles and warns those who sleep upon their rights that if their silence is too long continued they may lose them, for the law favors the active and vigilant. As plaintiffs say that there was *no* evidence of adverse possession, such as there is must be taken and considered most strongly against them, rejecting all in their favor. We cannot apply this rule without concluding at once that this contention must fail.

The *locus in quo* is swamp land and could only be used for the purpose of cutting and removing the trees for lumber, they being mostly juniper, which was standing in or near rivers and creeks, such as Alligator River, Northwest Fork, and Juniper Creek. These trees were cut and hauled away, and generally unloaded at Ballast Bank. The premises were, therefore, used and controlled just as would be done by the true owner, and the work was so long continued and so notoriously done as to give fair notice to any claimant of the land, and there is evidence to show that there was actual notice. It was also posted in places to warn trespassers away. There are other facts and circumstances which more or less tend to show possession of the land in the character of owner, and the doing of such things openly and persistently as indicated a clear assertion of title to it. The jury have found upon such testimony that the defendants had acquired the title by color and sufficient adverse possession, following the instructions of the court, which we deem to be free from any error, and unless there is some sound and valid objection not yet considered, we find no ground for a reversal.

The proceeding, entitled Jordan L. Jones, Administrator of James S.

Cahoon, v. Sarah Ann and Elizabeth Cahoon, his heirs, while not complete, is sufficient to show a record, consisting of the petition, order of sale of the lands to pay debts of the deceased, and confirmation of the sale to Charles McCleese, account of sale, etc., service of process on the guardian of the two defendants, who were infants, and deed to purchaser; and while some of the essentials must be inferred from the actual existence of others as shown in the roll, all are sufficiently substantiated by the documents themselves and entries on the minutes of the court. There is really more reliable evidence in this case of the pendency of the proceedings in the court of pleas and quarter sessions of Tyrrell, at January Term, 1847, and of their regularity throughout, from the original process to the final decree, than there was in *Irvin v. Clark,* 98 N. C., 437, as to the validity of the proceedings there in question, for in other material respects there were more deficiencies there, but the court in that case admitted the mere fragment of the minutes which was offered by defendants as evidence of the entire record. Furthermore, the evidence in this case shows that there was a partition proceeding between the heirs at law of Charles McCleese, entitled Martha Sawyer et al. v. C. W. Tatem et al., in which the court decreed a sale of the same lands, and they were sold to C. R. Johnson, the sale confirmed and deed executed by commissioner, Mr. Majette, to C. R. Johnson, who conveyed the lands to the defendant.

It would seem that all this record is fully sufficient to bring this case within the operation of the principle settled in *Roper Lumber Co. v. Richmond Cedar Works,* 165 N. C., 83, where we held that a purchaser at a judicial sale of land which was held in common, made for partition or otherwise, and a deed to the purchaser by the commissioner under the decree of the court were sufficient to constitute color of title, and that seven years adverse possession thereunder would vest the title in the purchaser as against the former tenants so holding the land. We, therefore, find no error in submitting the case to the jury in this respect.

The fact that none of the plaintiffs, as cotenants now claiming the land, made demand upon the defendant or those under whom it holds, or protested against their acts of trespass during the seven years and more, was surely competent, it being some evidence upon the question of adverse possession, as the failure to list the land for taxes would have been. *Austin v. King,* 97 N. C., 339. It would be strange if the owner of land should permit it to be occupied and used profitably and adversely by another, under a claim of ownership, without making any claim to it for seven years. This is not the usual conduct in such cases. The fact that the adverse occupancy continued for so long a period of time is some evidence that the plaintiffs knew of it.

The remark of the court to counsel alone, though in the presence and

hearing of the jury, as to the legal phase of the testimony, when he asked for the views of counsel, was no expression of opinion within the meaning and intent of the statute. *Observer Co. v. Remedy Co.*, 169 N. C., 251. It was held in *Harris v. Greenville Traction Co.*, 85 S. E., 899, that a remark by the trial judge in overruling a motion for a directed verdict was not in violation of a constitutional provision as an expression of opinion upon the weight or sufficiency of the evidence to prove a fact. 101 S. C., 360. If the court could not call for an argument from counsel upon the law of the case, for example, upon the question of law whether there is any evidence for the jury, trials could not be easily or expeditiously conducted. In a proper case, we have no doubt the learned judges would, in the exercise of their discretion, protect the parties by temporarily dismissing the jury when it appeared that either party might be prejudiced by the discussion of the law. There was no expression of opinion upon the facts, but merely upon the law, and the learned judge did not finally adopt his first impression. There was clearly no prejudice. *S. v. Jones*, 67 N. C., 285; *S. v. Browning*, 78 N. C., 555; *Williams v. Lumber Co.*, 118 N. C., 928.

If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted. *Simmons v. Davenport*, 140 N. C., 407; *Potato Co. v. Jeanette*, 174 N. C., 237. In the absence of such a request, we must hold the charge to be free from any error, as it covered the case and was correct in principle, and it was quite responsive to plaintiffs' prayers for instructions.

An objection that the judge did not correctly state the contentions of a party, when not made at the proper time, is unavailing. *McMillan v. R. R. Co.*, 172 N. C., 853; *S. v. Foster, ibid.*, 960.

The complaint that the judge did not state the law applicable to both sides, but only on defendant's side, is not supported by the record. Other exceptions are clearly without merit.

After a critical examination of the entire record, and upon a motion to nonsuit, or for the direction of a verdict, viewing the evidence most favorably for the defendants, as we should do (*Lynch v. Dewey Bros.*, 175 N. C., 152), we find no reason to disturb the result.

No error.

JOSEPH LAMB v. W. J. LAMB.

(Filed 26 February, 1919.)

1. **Easements—Drainage Systems—Implied Rights—Lands—Wills—Devise.**

Where lands are severed and held by devise, and during the testator's life he has constructed thereon a drainage system for the entire tract of a permanent nature, the right to the use of the system will pass by implication to the separate owners of the lands as apparent easements, though they may not originally have had any legal existence as such, as well as those necessary easements without which the enjoyment of the several portions could not be fully had.

2. **Same—Dominant Owner—Liability—Maintenance—Repairs—Negligence.**

Where a drainage system of an entire tract of land has passed as a right of easement to the devisees of the original owner, who holds the same in separate tracts, the dominant owner of the lands is only liable for maintenance and repairs to the extent that they are necessary and beneficial to his own estate; and while in the exercise of his right of enjoyment of his own part of the system he may enter upon the lands of the servient owner for the purpose of maintenance and repairs, with liability also for damages caused thereto by his willful or negligent breach of duty, the servient owner, who is also making use of the system, may not require the owner of the dominant estate to keep the drainage system on the servient owner's land in proper condition, at his own expense, for the latter's benefit.

3. **Easements—Drainage Systems—Dominant and Servient Tenant—Maintenance and Repairs—Liability.**

Where separate owners of lands have derived them subject to a drainage system placed upon the entire tract by the original owner, the general rule is, in the absence of statutory or contract provision controlling the matter, that each one using the system must bear the costs of maintenance and repair required by the portion of the system on his own premises, unless this adjustment would work such gross inequality of burden in the particular case as to require a different and more equitable one.

BROWN, J., not sitting.

ACTION tried before *Bond, J.*, and a jury, at July Term, 1914, of CAMDEN.

The action was instituted by plaintiff, the lower proprietor, against the defendant, adjoining and upper proprietor, to recover damages for flow of water wrongfully diverted upon plaintiff's land, and for damages caused by failure on part of defendant to clear off and properly maintain on plaintiff's land certain lead ditches running through both tracts, whereby it was claimed that plaintiff's land was sobbed and injured.

On specific issue submitted, there was verdict of the jury negativing the charge of wrongful diversion, and, his Honor having ruled that, on the facts in evidence, no recovery could be had on the second aspect of the case, there was judgment on the verdict for defendant, and plaintiff excepted and appealed.

Aydlett, Simpson & Sawyer for plaintiff.
Ehringhaus & Small for defendant.

HOKE, J., after stating the case: The facts in evidence tended to show that the plaintiff and defendant were adjoining proprietors of two tracts of land, the plaintiff owning the lower tract, along certain lead ditches hereinafter referred to; that they had obtained these tracts of land from their respective fathers, and they in turn held them under a devise from the grandfather, Abner Lamb; that Abner Lamb owned the land as one tract and during his possession had constructed a system of drains and ditches through the same, and at his death he divided the land into two tracts, described in the complaint, the lower of which has become the property of plaintiff and the upper the property of defendant, and at the time of his death and the different transfers these ditches and drains were openly maintained and used for the benefit of the land and its proper tillage; that the lead ditches ran from defendant's land through plaintiff's and on through lands of lower proprietors into a swamp, the ultimate and natural outflow, "and there were tap or side ditches of defendant running across his lands from lead to lead, and draining into the lands and then on through plaintiff's land, as stated; and that, on plaintiff's land, the latter, by his side or tap ditches, drained into these leads." There was also allegation, with supporting evidence on the part of plaintiff, tending to show that, some time prior to the institution of the suit, defendant had failed and refused to clear off and keep open the portion of these lead ditches which were on plaintiff's land, and by reason of such failure the same had proved inadequate to the proper drainage of plaintiff's property, causing damage thereto. It was shown, further, "that defendant had offered, in connection with plaintiff and others using the three big drains, or lead ditches, to pay his *pro rata* part of cutting out the ditch from end to end along with plaintiff and others using the same."

Upon these, the facts chiefly relevant to the question presented, and under authoritative decisions here and elsewhere, an easement was created, constituting the upper tract the dominant tenement and conferring on the owner the right of drainage over the lower by means of these lead ditches referred to, it appearing that Abner Lamb, the grandfather, when owner of the land as one tract, had established thereon an artificial system of drainage, continuous and permanent in its nature and openly used and enjoyed for the benefit of the entire property at the time the same was separated into two tracts and passed by devise to his sons, from whom the present parties acquired their titles, respectively. *Hair v. Downing,* 96 N. C., 172; *Shaw v. Etheridge,* 48 N. C., 301; *Mitchell v. Seipel,* 53 Md., 251; *Scott v. Moore,* 98 Va., 668; *Sanderlin v. Baxter,* 76 Va., 299; *Fayter v. North,* 30 Utah, 156; *Elliott v. Rhett,* 35 S. C.,

405; 3 Farnham on Waters and Water Rights, pp. 2440 *et seq.* In this last the South Carolina case the general principle applicable is well stated, as follows:

"Apart from all considerations as to time, there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have been used by the owner during the unity, though they have had no legal existence as easements, as well as all those necessary easements without which the enjoyment of the several portions could not be fully had."

We do not understand that the appellant desires to question the correctness of the principle as stated, but it is urged in his behalf that when the defendant's property has been constituted the dominant tenement, giving its owner an easement of drainage, as claimed, such owner has thereby become responsible for the costs and charges required for the upkeep of the ditches on the lands of plaintiff and is liable for damages caused by a breach of duty in this respect. It is undoubtedly the general rule that, in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone; that he has a right of entry upon the servient estate for the purpose indicated, and may be held liable for injuries arising from his willful or negligent breach of duty in these matters. The position finds support in *Hair v. Downing,* one of the North Carolina cases heretofore cited, and is very generally approved in the decisions and text writers on the subject. *Bellevue v. Daly,* 14 Idaho, 545; *Oney v. West Buena Visto Land Co.,* 104 Va., 580; *Dudgeon v. Bronson,* 159 Ind., 652; 9 R. C. L., 794-795; 14 Cyc., 1209; Jones on Easements, sec. 821. But in such case the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may, ordinarily, abandon it altogether, without infraction of any rights of the servient owner. 9 R. C. L., 795, citing *Pomfret v. Ricroft,* 1 Saund., 321, 10 Eng. Rul. Cases, 16, and *Mason v. Shrewsbury, etc., Ry. Co.,* L. R., 6 Q. B., 578, 10 Eng. Rul. Cas., 22, and note, a general principle recognized and applied in this State in *Canal Co. v. Burnett,* 147 N. C., 41. But where, as in this case, a system of drainage has been constructed for the benefit of the two properties and is used and enjoyed by the owners of both, the general rule is, or should be, as held by the court below, that each is required to maintain the portion of the system on his own land, unless the conditions and circumstances presented should make such an obligation so unequal and burdensome on one at the expense of the other that a different method of adjustment would be required. While we have found very little authority bearing on the direct question, the rule suggested will usually make for the right

of the matter, and seems to be approved in *Winslow v. Furhman,* 25 Ohio St., 639. On the record, the evidence offered in support of plaintiff's claim is not set out in detail, but from the general statement we conclude that his demand is made to rest—and he so intends it—on the proposition that the defendant is liable to bear the entire burden of keeping these lead ditches open, and he is charged with the full expense of maintenance and repairs, not only for the proper use and enjoyment of his own easement, but for the benefit also of the servient estate.

We are confirmed in this estimate of plaintiff's case by the statement appearing in the record, that "defendant had offered, in connection with plaintiff and others using the three big drains or lead ditches, to pay his *pro rata* part of cutting out the ditch from end to end," etc., and this, in any event, is all that plaintiff could justly require.

We find no error in the ruling of his Honor, and the judgment for defendant must be affirmed.

No error.

M. E. BRADLEY ET ALS. v. CAMP MANUFACTURING COMPANY.

(Filed 26 February, 1919.)

1. Fires—Damages—Evidence.

Where the defendant is responsible in damages for the destruction of timber growing upon the plaintiff's lands, which it negligently set on fire, testimony of the difference between the value of the land before and after the burning is competent upon the issue as to the amount of damages recoverable in the action.

2. Appeal and Error—Questions and Answers—Leading Questions.

No error on appeal will be found the exclusion by the trial judge of a leading question asked by a party of his own witness.

3. Trials—Counsel—Arguments—Instructions.

A remark of counsel in his address to the jury will not be considered, on appeal, as such a flagrant abuse of his privilege as to warrant a new trial, when it appears that the jury doubtless passed it by without prejudice as being merely a too fervid utterance in the heat of debate, and the judge's charge was sufficient to prevent an injurious effect upon the adversary party.

4. Instructions — Contentions — Misstatements — Court's Opinion—Contentions—Appeal and Error—Objections and Exceptions.

An objection to a statement by the trial judge of the allegations and contentions of the parties should be made at the time to afford him an opportunity for correction, or it will not be considered on appeal; nor will the statement be regarded as an intimation by the judge of his own opinion.

5. Instruction—Court's Opinion—Damages—Pleadings—Appeal and Error—Prayers for Instruction.

The mere restriction of the amount of damages recoverable in an action to the demand therefor, as stated in the complaint, is not to the defendant's prejudice nor objectionable, as an expression of the opinion of the judge thereon, it being required that defendant offer special prayers if he desired more specific instructions as to the measure of damages.

6. Fires—Damages—Timber—Evidence.

In this action to recover damages for the negligent setting fire to the timber on plaintiff's lands, there was evidence tending to show that a spark from defendant's engine set fire to defendant's foul right of way and burned the plaintiff's adjoining lands, and it is held sufficient to take the case to the jury, it being incumbent on the defendant to satisfy the jury that its engine, which was in its possession and control, was properly equipped and handled, they being matters peculiarly within its own knowledge, or take the chance of an adverse verdict.

7. Appeal and Error — Indefinite Objection and Exception — Exception to Charge Containing Two Propositions, One Correct and the Other Not.

Exceptions to the judge's charge, embracing two separate propositions, one of which is correct, is too broad, and will not be considered on appeal.

BROWN, J., not sitting.

ACTION tried before *Kerr, J.*, and a jury, at August Term, 1918, of NORTHAMPTON.

Plaintiff alleged that the timber, brush, rails, and fences on his land were burned by sparks which came from defendant's locomotive engine as it passed near plaintiff's premises, and that the fire was caused by the negligence of the defendant.

There was ample testimony to show that the fire was set out by defendant's engine, and the jury found that it was negligently done, and assessed the damages. Defendant appealed from the judgment upon the verdict.

W. L. Long, W. H. S. Burgwyn, and George C. Green for plaintiff.

Winborne & Winborne, Peebles & Harris, and G. E. Midyette for defendant.

WALKER, J. As to Massey's testimony concerning the value of the timber, there was no error, because he testified that, irrespective of what he got for his own timber, or its value, he was of the opinion that the difference in value of plaintiff's land before and after the fire was between $15 and $20 per acre. We do not concede, though, that the objection was made in proper time, or that it was not within the discretion of the court whether or not it would consider it.

The question asked the witness, J. A. Shaw, was leading, and properly

excluded on that ground, even if it was otherwise competent, which it seems not to be. *G. F. U. Warehouse Co. v. Am. Agr. Chemical Co.,* 176 N. C., 509.

The remarks of counsel to which exception was taken were not such a flagrant abuse of their privilege as to be ground for a new trial. It is apparent that no real harm was done, and the jury doubtless passed it by, without prejudice, as being merely a too fervid utterance of counsel in the heat of debate. It was intended only to emphasize the absurdity of defendant's very small estimate of the plaintiff's loss. It is one of the inseparable incidents of all trials, and should not be taken too hard, but overlooked upon the principle of "give and take." It was provoked, too, by what the defendant had previously said.

The judge's charge as to damages was sufficient to prevent injury to the defendant in this case from the remark.

We do not agree with the learned counsel that there was any intimation of opinion by the court upon the facts. When it is supposed to have occurred, the judge was only stating the allegations, or contentions, of the plaintiff, and the nature of the case, and not expressing any view of his own. If he misstated them, his attention should have been called to it then, when timely correction could be made by him. It is too late after verdict to complain. *Jeffrees v. R. R.,* 158 N. C., 215; *S. v. Cox,* 153 N. C., 638; *S. v. Blackwell,* 162 N. C., 672; *S. v. Merrick,* 172 N. C., 870; *S. v. Johnson, ibid.,* 920; *S. v. Earl Neville,* 175 N. C., 731. He who fails to speak when his time comes to be heard will not be heard when he should be silent. He will not be allowed two chances at the verdict. *S. v. Tyson,* 133 N. C., 692. But a mere recital of contentions, as we have seen, is no expression of an opinion upon the facts or the weight of the testimony. *Jarvis v. Swain,* 173 N. C., 9. Restricting plaintiff's maximum recovery to the amount stated in the complaint was in favor of defendant, and surely is no expression of opinion that the damages should be the amount thus claimed. If defendant desired more specific instructions as to damages, it should have asked for them.

The charge upon negligence, when considered as a whole, was in accordance with our decisions upon the subject. *Aycock v. R. R.,* 89 N. C., 321; *Williams v. R. R.,* 140 N. C., 623; *Knott v. R. R.,* 142 N. C., 242; *Haynes v. Gas Co.,* 114 N. C., 207; *Cox v. R. R.,* 149 N. C., 117; *Kornegay v. R. R.,* 154 N. C., 389; *McRainey v. R. R.,* 168 N. C., 570; *Aman v. Lumber Co.,* 160 N. C., 370, and especially *Boney v. R. R.,* 175 N. C., 354, where the principal cases are collected and the doctrine stated. The charge must be construed as a whole. *Kornegay v. R. R., supra.*

There was sufficient evidence to prove that the track was foul, and also the space within 10 feet of it, and that the fire started there and burned the adjoining lands. It was for the jury to say whether the engine was

properly equipped and handled, as the cases we have just cited show; and it was for the defendant to satisfy the jury that there was no negligence in this respect to take the chance of an adverse verdict. The facts were peculiarly within its knowledge, as it had the possession and control of the engine, and could establish them better than could the plaintiff. *Haynes v. Gas Co., supra.*

We may further say that the exception to the charge is too broad, as it embraces two separate propositions, one of which is plainly correct. *Quelch v. Futch,* 175 N. C., 694, and cases cited.

There is no merit in the other exceptions.

No error.

BELLA PATILLO ET ALS. v. CAMP MANUFACTURING COMPANY.

(Filed 26 February, 1919.)

See next preceding case of *Bradley v. Camp Manufacturing Company.*

BROWN, J., not sitting.

W. L. Long, W. H. S. Burgwyn, and George C. Green for plaintiff.

Winborne & Winborne, Peebles & Harris, and C. E. Midyette for defendant.

WALKER, J. This case was heard, by consent, with *Bradley v. Camp Manufacturing Company,* and is governed by the opinion filed in that case, the facts and exceptions being substantially the same.

No error.

IN RE WILL OF ELIZA J. SAUNDERS.

(Filed 5 March, 1919.)

1. Evidence—Wills—Erasures—Deceased Persons—Transactions and Communications—Statutes.

Upon the trial of a *caveat* to a will, the testimony of the beneficiaries thereunder that certain erasures were in the will when it was opened, after the testator's death, and that they did not make them, is not a communication or transaction with a deceased person prohibited by Revisal, sec. 1631.

2. Evidence—Wills—Erasures—Burden of Proof—Trials.

Declarations of the testator that he had stricken out certain parts of his will is competent evidence when testified to by a disinterested witness, and the burden of proof is upon the persons claiming thereunder to show that the testator had not made the erasures.

IN RE WILL OF SAUNDERS.

APPEAL by *caveators* from *Whedbee, J.*, at November Term, 1918, of CRAVEN.

Abernethy, Henderson & Willis for propounders.
A. D. Ward and A. F. Ward for caveator, appellant.

CLARK, C. J. The will of the testatrix has been probated, both in common and solemn form. The only question presented was as to whether certain words which had been erased with pen and ink were erased by the testatrix or some one else at her request, or whether it was done without authority. When the will was opened the erasures were in the will. There was testimony that the testatrix had told the witness that these names had been marked out by her, and that the propounders, her daughter and her grandson, would get all the property.

The exceptions are solely to the competency of the grandson and the daughter, devisees under the will. The grandson, Elias Windley, testified that when the will was opened these erasures were in the paper, and that he did not make them.

Mary E. Windley, the daughter of the deceased and also a beneficiary in the will, testified that she did not see the will before her mother's death, and that she did not make the alterations.

These were matters which occurred after the death of the testator, and which were not transactions or communications between her and the witness.

The declaration of the testator, after he made the will, that he had stricken out any part thereof, was competent, and the burden was on the parties claiming to hold under the erased part that it was not erased by the testator. *Barfield v. Carr,* 169 N. C., 574.

Under Revisal, 1631, formerly Code, 590, the parties in interest are disqualified from testifying only as to personal transactions with the deceased.

For instance, such party could testify that a paper-writing was in the handwriting of the deceased (*Hussey v. Kirkman,* 95 N. C., 65; *Armfield v. Calvert,* 103 N. C., 147; *Sawyer v. Grandy,* 113 N. C., 42), or as to any independent fact which was neither a transaction or communication with the testator. *McCall v. Wilson,* 101 N. C., 600; *Cox v. Lumber Co.,* 124 N. C., 78; *Davidson v. Bardin,* 139 N. C., 3. The subject is fully discussed, with citation of authorities, *Johnson v. Cameron,* 136 N. C., 243; *Brown v. Adams,* 174 N. C., 502. The latest case on the subject is *Sutton v. Wells,* 175 N. C., 3, which holds that "A party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased, or is based upon independent knowledge not derived from such source."

No error.

JOHN G. DAWSON, COMR., v. D. E. WOOD.

(Filed 5 March, 1919.)

1. **Estates—Remainder—Contingent Interests—Sales—Statutes.**

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there was "a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine whom the remaindermen are," under the procedure therein laid down. Public Laws 1903, ch. 99; Pell's Revisal, sec. 1590.

2. **Same—Actions—Parties Plaintiff.**

Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. Pell's Revisal, sec. 1590.

3. **Estates — Remainder — Contingent Interests— Sales— Statutes— Investments—Reinvestments.**

The provision of chapter 548, Laws 1905, requiring that the proceeds of the sale of land, under the statute, where the remaindermen of contingent interests cannot be ascertained in the lifetime of the first taker, shall be reinvested in realty within two years, was removed by chapters 956 and 980, Laws 1907, leaving the matter of reinvestment somewhat in the discretion of the court, with the clear intimation that the reinvestment in realty should be made when an advantageous opportunity should be offered.

4. **Estates — Remainder — Contingent Interests—Actions—Parties Defendant—Statutes.**

In proceedings under the statute (Pell's Revisal, sec. 1590) to sell lands held in remainder, upon contingencies rendering the remaindermen incapable of present ascertainment, etc., the necessary parties defendant are those of the remaindermen who, on the happening of the contingency, would have an estate in the property at the time of action commenced, and those remotely interested to be represented and protected by a guardian *ad litem*, as the statute provides.

5. **Constitutional Law—Statutes—Estates—Remainders—Contingent Interests—Sales.**

Pell's Revisal, sec. 1590, providing for the sale of land affected with certain contingent interests does not in its terms or purpose profess or undertake to destroy the interests of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, subject to the use of a reasonable portion of the amount for the improvement of the remainder, properly safeguarded, with reasonable provision for protecting the interest of the unascertained or more remote remainderman by guardian *ad litem*, etc., and is constitutional and valid.

6. Estates— Remainder— Contingent Interests— Statutes—Purchaser—Contracts—Deeds and Conveyances.

Where the commissioner appointed by the court has sold lands affected with contingent interests in remainder of such character that those to whom such interests will ultimately vest are not presently ascertainable, and the provisions of Revisal, sec. 1590, have been carefully pursued, the interest of the contingent remaindermen properly safeguarded, and an advantageous sale has been made, the deed of the commissioner to the purchaser conveys a valid title, and he may be compelled to comply with his contract of purchase.

7. Estates — Remainder—Contingent Interests—Statutes—Independent Actions.

As to whether the purchaser of lands affected by remote and presently unascertainable contingent interests in remainder, sold under proceedings in all respects conforming to the provisions of Pell's Revisal, sec. 1590, can, in an independent action by the commissioner therein appointed to enforce the contract of sale, object to the validity of the sale, *Quære?*

8. Judgments—Estoppel—Estates—Contingent Interests—Statutes.

A judgment in an action rendered adverse to the petitioner to sell lands, claiming title, where the inquiry only related to the petitioner's title and right to sell, and involves the question as to whether the facts and conditions as alleged and then existent rendered the sale expedient and for the best interest of remote and unascertainable contingent interests in remainder, is not an estoppel in a subsequent action under changed conditions and brought under the provisions of Pell's Revisal, sec. 1590, authorizing such sale when its provisions are complied with.

9. Estates—Remainder—Contingent Interests—Sales—Life Tenants.

Pell's Revisal, sec. 1590, by providing that a sale of lands affected by certain remote contingent interests may be made when the interest of all parties would be practically enhanced, does not require that the interest of the life tenant therein should be made to suffer for the benefit of the contingent remainderman alone, when the income is absorbed by current costs and charges, for the rights and interests of all parties in interest should be considered and determined with a sense of proportion and in reasonable adjustment of the rights of all.

10. Appeal and Error—Objections and Exceptions—Estates—Contingent Interests—Purchaser.

In proceedings under Pell's Revisal, sec. 1590, to sell lands affected with presently unascertainable contingent interests in remainder, it is not open to objection by the purchaser at the sale, regularly had and in conformance with the statute, that the decree of the court was inequitable to the life tenant as to the proportion of interest on the proceeds of the sale, as such objection is open only to the party affected, and is not essential to the purchaser's title.

CONTROVERSY without action, from LENOIR, submitted on case agreed, and decided by *Allen, J.*, resident judge of the Sixth District, on 8 February, 1919.

Plaintiff, under a decree of the court, in a cause, duly constituted, of

Laura A. Miller *et al.* v. Julia B. Faulkner *et al.,* and as commissioner in the cause, having contracted to sell the land, the subject-matter of said suit, to defendant, D. E. Wood, at the price of $33,000, and the payment of certain assessments for paving, etc., which said sale was fully approved, etc., the said purchaser, on demand made, declines to take the property or comply with the terms of the bargain, claiming that the commissioner is not in a position to make a valid title.

On the case presented, the court, being of opinion that the title offered was a good one, entered judgment for recovery of purchase price and the delivery of the deed on payment of same or compliance with the terms of the decree. From this judgment the defendant appealed.

Dawson, Manning & Wallace for plaintiff.
Rouse & Rouse for defendant.

HOKE, J. From the facts, properly presented, it appears that the real estate in question belonged to one Richard F. Green, who has died, making disposition of the same by his last will and testament, as follows:

"Item IV. I give and bequeath to my wife, Eliza B. Green, my house and lot in the town of Kinston, N. C., in which I now reside, to go with all my household and kitchen furniture and all other improvements thereto belonging, to have and to hold during her natural life, and at her death to go to my daughter, Laura A. Green, to have and to hold during her natural life, and at her death to her nearest blood relative."

2. That the wife, Eliza B. Green, is dead, and Laura A. Miller, having married, is the Laura A. Green referred to in the aforesaid devise, and that Julia B. Faulkner and Laura A. Harding were, at the time of the proceedings instituted under which the present sale was had, and are now, the nearest of kin of said Laura A. Miller, and the former has six children now living, one of whom is a minor, and the latter also has now living children and grandchildren, resident and nonresident, and most of whom are minors.

3. That the present life tenant, Laura A. Miller, in May, 1918, instituted an action to sell said property for reinvestment, under section 1590 of the Revisal, making the present nearest blood relatives, Julia B. Faulkner and Laura A. Harding, parties defendant, and in same proceedings it was made to appear, by averment and otherwise, that this was a desirable, valuable lot in the business section of Kinston, N. C., subject to the taxes and assessments usually imposed on such property; "that the lot yields very little income and is burdensome; that the buildings situated upon it are very old, have become in a bad and dilapidated condition, which are yearly growing worse, to the end that the said structures will soon be valueless, and are in fact at this time in a damaging

condition, and the income yielded by the said property does not exceed $200 per year; that on account of the condition of the title to the said lot of land, as above set forth, no one feels justified in improving the structures situated upon said land, which consists only of a dwelling-house and a small out-house, nor do they feel justified in placing new buildings upon the said lot of land, to the end that the revenue from the said lot may be increased, for the reason that if any one should make expenditures in the improvement of the said lot, it might, by reason of the condition of the said title, result in a loss to them of any amount which they might expend"; and praying for a sale of same for reinvestment, provided as much as $30,000 could be obtained therefor, with a cash payment thereon of $5,000.

The next of kin, having accepted service, did not answer the averments of the petition showing the necessity of sale, and made no resistance to the application. It was thereupon adjudged that J. G. Dawson, as commissioner in the cause, make inquiry as to the value and obtain and submit bids for the property considered adequate and desirable. And it was furthermore adjudged, after due inquiry, that Y. T. Ormond be and he was appointed guardian *ad litem* in said action "to represent in same, as contemplated by law, any persons under disabilities and any person not now in being or whose names and residences are not known, or who may in any contingency become interested in said land"; and, summons having been duly issued, said guardian voluntarily appeared in the cause, waiving service, etc., and accepting appointment as such guardian; that at the January Term, 1919, of Superior Court of Lenoir County, the said commissioner made his report, submitting that, after full advertisement and due inquiry, the present defendant, D. E. Wood, had bid for the property $33,000, of which $15,000 was to be paid in cash and the remainder with bond, payable on or before 10 years, with interest, and properly secured. The bid and security offered was set forth in the report, and the said bidder also agreed to pay eight-tenths of the amounts now due for paving assessments against the property, aggregating $750.65. The commissioner further reported that the price offered was the reasonable worth of the land; that it was the best price possible to obtain for it, and that the interest of all the parties would be materially enhanced by a sale at the amount stated, and recommended that the sale be made on the terms proposed. And the guardian *ad litem,* appointed after due inquiry, answered under oath and admitted that the price offered was fair and reasonable worth of the property; "that the interest of all the parties on said proceedings required that the land should be sold, and same would be greatly enhanced in value by the sale to D. E. Wood at the price and on the terms stipulated."

It was further made to appear that heretofore, in 1913, this present

plaintiff had instituted an action against the defendants, Julia B. Faulkner and Laura A. Harding, then and now the nearest of kin, seeking a sale of this property on allegation that she was absolute owner in fee under the terms of her father's will, and, if otherwise, asking for a sale for reinvestment under the statute. In that case, entitled *Miller v. Harding,* reported in 167 N. C., 53, there was judgment holding that plaintiff had only a life estate in the property and that the right to a present sale had not been shown.

In this jurisdiction, and on the facts thus presented, the courts have not had the inherent power to decree a sale of property and pass a valid title to the purchaser, the remainder here being limited on a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant. *Hodges v. Lipscombe,* 128 N. C., 57; *Aydlette v. Pendleton,* 111 N. C., 28; *Williams v. Hassel,* 74 N. C., 434; *Watson v. Watson,* 56 N. C., 401. In other States, and generally, the power in question has been more broadly exercised. See *Bolfil v. Fisher,* 3 Rich. Eq., 1; *Baylor's Leassee v. De Jarnett,* 54 Va., 152; *Ruggles v. Tyson,* 104 Wis., 500, and like cases. And, to remove the restrictions prevailing under our decisions, and with a view of unfettering these estates, to the end that the property might be more profitably employed, the General Assembly of 1903 (chapter 99, Pell's Revisal, sec. 1590) passed a statute conferring on the courts the power to order a sale and transfer of the title in all cases where there was "a vested interest in real estate with a contingent remainder over to persons not in being, or when the contingency has not yet happened which shall determine who the remaindermen are." That the proceedings could be instituted by any person having a vested interest in the land, and all persons *in esse* who are interested shall be made parties defendant and served with a summons, and "where the remainder will or may go to minors or persons under disabilities or to persons not in being and whose names and residences are not known, and who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the Superior Court shall, after due inquiry of persons who are in no way interested in or connected with the proceedings, appoint some discreet person as guardian *ad litem* to represent such remaindermen, upon whom summons shall be served as provided by law for other guardians *ad litem,* and it shall be the duty of such guardians to defend such actions, and, when counsel is needed, to make this known to the judge, who shall by order give instructions as to the employment of counsel and the payment of his fees, and the court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property, or any part thereof, for reinvestment, either in purchasing or improving the real estate, less expense, etc., and

such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as the property ordered to be sold, and the court may authorize the loaning of such money, subject to its approval, until such time when it can be invested in real estate."

In Laws of 1905, ch. 548, this reinvestment in realty was required to be within two years, but such requirement was removed by the later Acts of 1907, chs. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered.

Construing the statute as amended in the carefully considered case of *Hodges v. Lipscombe,* 133 N. C., 199, the Court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could properly have their interest represented and protected by a guardian *ad litem* as the statute provides. It will be noted that the statute does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment and subject to the right to use a reasonable portion of the amount for the improvement of remainder, a case presented in *Smith v. Miller,* 151 N. C., 620, and approved, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. This being true and a reasonable provision being made for protecting the interest of the unascertained or remote remaindermen by a guardian *ad litem,* carefully selected and duly notified, the statute is undoubtedly a constitutional enactment and has been approved in this and other respects by numbers of decisions dealing directly with the subject. *Pendleton v. Williams,* 175 N. C., 248; *Smith v. Witter,* 174 N. C., 616; *Smith v. Miller,* 151 N. C., 620; *Hodges v. Lipscombe,* 133 N. C., 199; *Springs v. Scott,* 132 N. C., 548.

In *Springs v. Scott* and *Smith v. Miller, supra,* the constitutionality of the statute was directly and fully considered, and in *Pendleton v. Williams,* speaking to this and other features of the act, the Court said: "It is very generally recognized that statutes of this kind, being no interference with the essential rights of ownership, but operating rather in addition to those already possessed by the owners of such estates, are well within the legislative powers (citing Lawson's Rights and Remedies, sec. 3867), and the act we are presently considering has been repeatedly approved and applied by decisions of this Court, the law being construed to authorize a sale of the property or the portion of it affected by the contingent interest, and not a sale of the contingent interest separately,

citing *Smith v. Witter,* 174 N. C., 616; *Anderson v. Wilkins,* 142 N. C., 154; *Springs v. Scott, supra,* and other cases.

Under these authoritative interpretations, and on perusal of the record in which this decree of sale was had, it will appear that the petitioner's case comes clearly within the statutory provisions, the methods required have been carefully pursued, the interest of the contingent remaindermen properly safeguarded, an advantageous sale has been affected, and we must concur in the view of his Honor below that the present plaintiff, as commissioner, is in a position to offer a good title, and the contract of the purchaser must be complied with.

This being virtually an independent action by the commissioner to collect the purchase money, there is doubt if any of the objections urged against the validity of the sale are available to defendant while the decree in the principal suit remains unchallenged, either by appeal or motion in the cause.

There seems to be nothing jurisdictional in these objections; but if the contrary be conceded, we are of opinion that none of them can be sustained.

It was chiefly urged that the petitioner in the principal proceedings is barred of his right to a sale for reinvestment, by reason of a judgment denying such right in a former suit instituted by her for the same purpose in 1913 and reported in 167 N. C., 53.

It is undoubtedly the accepted principle here and elsewhere that an adversary judgment will usually conclude the parties as to all matters involved in the issue as stated and defined in the pleadings. *Holloway v. Dunham,* 176 N. C., 550-552, and authorities cited. But an examination of the former case will show that the matters there in issue were: (1) whether the petitioner was the owner, as she claimed, of an absolute fee simple in the property, and (2) whether, under the facts and conditions as alleged and then existent, a present sale was expedient and for the best interest of all the parties concerned. A comparison of the two cases will disclose that, while the quantity of the petitioner's estate, being a question fixed in its nature, was there finally determined against her, on the second, a variable question, as to the expediency of the sale, there are such pronounced differences in the conditions presented that the judgment in the first case could in no sense be considered an estoppel of record in the second. In the former, the proposition was to have a sale at public auction without further inquiry and a suggested value of $15,000 to $18,000, with the persons required to be made parties by the statute in active resistance to the measure, while in the instant case, on careful inquiry, an adequate and responsible bid of $33,000 is presented for consideration, together with relief from $700 to $800 of accumulated assessments and with the proposed measure fully acquiesced in by all

persons who are proper parties under the statute and recommended by reliable officials of the court, who had the matter in special charge. On the case as now presented, and the question of expediency, we must hold, as stated, that the former judgment denying a sale is no bar to such a decree in the present suit. It is further insisted that the decree should not be upheld, for the reason that no proper inquiry has been shown as to the necessity and expediency of the present sale. As we have heretofore stated, we incline to the opinion that such an objection is not available in a suit for the purchase money; but in any event it is not open to defendant, on the facts of this record, and we are clearly of opinion that full and adequate inquiry has been shown, it appearing that, before decree made, a conscientious, capable and diligent commissioner, both by public advertisement and personal effort, has made painstaking inquiry into the facts and has succeeded in presenting to the court a bid of $33,000, $15,000 of which is in cash and the remainder sufficiently secured; that the desirability of the sale at such a price is admitted by the parties of record, including a disinterested and intelligent guardian *ad litem,* appointed and acting in the interest of the contingent remaindermen. As a matter of fact, with property of this value, inadequately improved, in a progressive business town, with ever-increasing taxes and assessments against it, and yielding a return of only $200, the desirability of a sale for reinvestment would seem to be revealed by the objective facts. In providing that a sale could be made when the interest of all parties would be materially enhanced, the statute does not require that a life tenant should acquiesce and suffer under such conditions, where the entire income is absorbed by current costs and charges, and for the benefit of the contingent remaindermen alone; but the question should be considered and determined with some sense of proportion and in fair and reasonable adjustment of the rights of *all* parties interested.

Again, it is objected that the decree in the principal case provides that the interest on the fund shall be paid, one-half to the life tenant and one-fourth each to the contingent remaindermen made parties under the statute. This might be a good ground of exception if it were made by the life tenant, but if she has seen proper to consent to such a disposition of the income, this assuredly is no concern of the purchaser, nor could it in any way affect the question of the title that is offered him. In the recent case of *Pendleton v. Williams, supra,* which is an authority apposite to several of the questions presented in this appeal, the Court, in response to a similar objection, said: "So far as the purchaser is concerned, the statute having given the power of sale, and all the parties in interest being before the court, there is no reason why a good title cannot be conveyed to him, and he is no way charged with the duty of seeing that the purchase money is properly distributed. When a purchaser has

paid his bid into court or to its officers duly authorized to receive it, he is quit of all further obligation concerning it, and, as to him, the judgment must be affirmed," citing *Wilkerson v. Brinn,* 124 N. C., 723, and 16 R. C. L., title Judicial Sales, sec. 83.

On the record, we are of opinion that the judgment directing the collection of the purchase money, according to the terms of sale, should be affirmed, and, on final judgment, proper provision be made for securing the fund according to the provisions of law and the course and practice of the court.

Affirmed.

J. L. HARTSFIELD v. JAMES A. BRYAN AND HEIRS AT LAW OF JOHN HAYWOOD, DECEASED.

(Filed 5 March, 1919.)

1. Clerks of Court—Judgments—Motions—Terms of Court.

There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad.

2. Motions—Judgments—Attorney and Client—Attorney in Fact—Principal and Agent—Demurrer—Form of Motion.

While it is the better form for one making a written motion, as attorney at law and in fact for the heirs at law of the original owner, to set aside a judgment rendered by the clerk of the Superior Court, in proceedings for partition of lands, to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., as the heirs at law of the deceased, is merely informal and harmless, and therefore good against a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is solely acting in a representative capacity for the persons named.

3. Pleadings—Statutes—Cause of Action—Demurrer.

Under our Code system, a pleading will be sustained against a demurrer if, when liberally construed, the whole or any part thereof presents facts sufficient to constitute a cause of action, or if such facts can be gathered from it, though the pleader may not disregard the ordinary and familiar rule that the facts should be concisely and plainly stated, so that it may appear, at least, with reasonable certainty what is the controversy and what are the essential issues to be submitted to the jury, upon which the case may be tried on its merits.

4. Appeal and Error—Court's Discretion—Both Parties in Default—Costs.

In this case, where a demurrer was filed before the clerk to a written motion asking to set aside a judgment in proceedings for the partition of lands, it is *Held*, as the demurrer would probably not have been interposed

if the petition had been drawn with more regard for the rules of pleading, as to certainty and precision, both parties are somewhat in default, and the court, in the exercise of its discretion, directs the costs of the appeal to be equally divided between them.

CLARK, C. J., did not sit.

APPEAL by defendant Bryan from *Whedbee, J.*, at November Term, 1918, of CRAVEN.

This is a petition, or written motion, in the above entitled special proceeding, for partition, to set aside the judgment rendered therein on 6 February, 1900, by the clerk of the Superior Court, by which the lands were ordered to be sold. The sale was made to James A. Bryan, one of the defendants, and confirmed by the clerk.

The petition to set aside the judgment is entitled as of the original cause, but is addressed to the Clerk of the Superior Court of Craven County, as follows: "Your petitioner, R. E. Whitehurst, attorney at law and in fact, for and in behalf of W. I. Hall and many others (naming them), heirs at law of John Haywood, deceased, and on behalf of all other persons having a like interest as heirs of John Haywood, deceased, respectfully petitions the court, as follows." Then follows a statement of the facts upon which the motion is based, it being alleged, among other things, that the publication of the summons was defective, and that the judgment was not indexed and cross-indexed, as required by the statute, and the petitioners have had no notice of it until recently. It is then further alleged: "That your petitioner, R. E. Whitehurst, is attorney at law and in fact for a portion of the heirs at law of John Haywood, owners of more than one-third of the undivided interest in the estate of John Haywood, and that this petition is brought on their behalf as well as on the behalf of other persons having a like interest with them."

The defendant James A. Bryan demurred to this petition, upon the grounds:

1. That said petition is deficient in law, for that it appears on its face—

(*a*) It does not give any term of court or any court in the caption to which it is applicable.

(*b*) That it is not made or filed in the name of the real parties in interest, to wit, the heirs of John Haywood, deceased.

(*c*) For that it appears that it is filed by R. E. Whitehurst, an attorney at law and in fact, and that the said R. E. Whitehurst has no interest in the subject-matter and is not the real party in interest.

2. That it appears on the face of said complaint that it does not state facts sufficient to constitute the cause of action—

(1) For that it does not appear in any allegation of the complaint that R. E. Whitehurst, the petitioner, is the real party in interest.

(*d*) For that it does appear on the face of the complaint that R. E. Whitehurst, the petitioner, is not the real party in interest and has no interest in the subject-matter.

(*e*) For that it does not appear in any of the allegations of the complaint that the real parties in interest are filing the petition or making the application.

(*f*) For that it is not alleged in any allegation of the complaint that the persons named in the paragraph immediately preceding the first allegation are the heirs at law of John Haywood and the heirs at law of the particular John Haywood referred to in the title of the cause, or are in any other respect owners of the John Haywood interest in the lands referred to in the petition.

The clerk overruled the demurrer, and the defendant James A. Bryan appealed to the Superior Court, and in that court the judgment of the clerk was affirmed, and the same defendant appealed and assigned the overruling of his demurrer as error.

C. R. Thomas and R. E. Whitehurst for plaintiff.
Ward & Ward for defendants.

WALKER, J., after stating the case: There are no terms of court where a proceeding is pending before the clerk. He has no stated terms or sessions, and each case has its own return day. The petition is therefore sufficiently entitled if any defect of the kind indicated would be the subject of demurrer.

We are of the opinion that there are sufficient allegations as to the real parties in interest, and as to those who are named in the first paragraph of the petition being the heirs of John Haywood. The specific allegation is that the petitioners for whom Mr. Whitehurst appeared as attorney at law and in fact are "the heirs at law of John Haywood, deceased," and also that he appeared "on behalf of all other persons having a like interest as heirs of John Haywood, deceased." Here is a clear statement that the said parties are heirs at law of John Haywood, and that they are the persons who are really interested in the special proceeding.

The objection that Mr. Whitehurst brings the suit in his own name, although for the parties named, and is not himself interested in the proceeding, is untenable, as he does not in fact sue for himself or set up any interest in the property which is in dispute, but brings the suit only in behalf of those parties. It is substantially the same as if he had first named the parties and then stated that they appeared by him as their attorney, which would have been the better form. The error, though, is formal only, and not at all material, as the true character of the proceeding appears with sufficient certainty. A complaint will be sustained

as against a demurrer, as we have held, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms. *Blackmore v. Winders,* 144 N. C., 212; *Bank v. Duffy,* 156 N. C., 83; *Eddleman v. Lentz,* 158 N. C., 65, 66; *Hendrix v. R. R.,* 162 N. C., 9. We said in *Bank v. Duffy, supra,* that a complaint will not be overthrown by demurrer unless it is wholly insufficient—that is, if from all its parts we can see that there is a cause of action and sufficient ground for relief in law or equity. But it must not be supposed, as was said in *Eddleman v. Lentz, supra,* that because pleadings are now under the Code construed favorably to the pleader, to effectuate the main purpose of having cases tried upon their real merits, it permits the pleader to disregard the ordinary and familiar rule requiring pleadings to be so drawn as to present clearly the issues in the case. The Code provides that the cause of action shall be plainly and concisely stated, but this does not mean that essential fullness of statement shall be sacrificed to conciseness, but that all the facts going to make up the cause of action must be stated as plainly and concisely as is consistent with perfect accuracy, and that no material allegation should be omitted. Looseness in pleading and inadequacy of allegation are as much condemned by the present code of procedure as they were under the former strict and exacting system of the common law. It is form and fiction that have been abolished, but the essential principles of good pleading have been retained. *Blackmore v. Winder, supra,* and *Bank v. Duffy, supra.*

We think the petition in this case is framed with such substantial accuracy as to disclose a good cause of action. *Brewer v. Wynne,* 154 N. C., 467; *Womack v. Carter,* 160 N. C., 286. But, while we sustain the judge in overruling the demurrer, we can well see that if the petition had been drawn with more regard for the rules as to certainty and precision, the demurrer would not have been interposed, and this appeal would have been avoided. Consequently, both parties were at fault, and for this reason and in the exercise of our discretion we divide the costs of this Court. The plaintiff will pay one-half and the defendant James A. Bryan the other half thereof. The defendant will be allowed to answer when issues can be framed and the case tried upon its merits. He will then have an opportunity to be heard upon all the facts, without prejudice from the overruling of the demurrer.

No error.

BRUCE HOLT v. OVAL OAK MANUFACTURING COMPANY.

(Filed 5 March, 1919.)

1. **Appeal and Error—Remarks of Counsel—Prejudice—Correction—Instructions—Attorney and Client.**

While improper and prejudicial remarks by counsel to the jury upon matters not embraced in the issues are ordinarily sufficient grounds for the granting of a new trial on appeal, the prejudice thus created may be removed by the prompt and clear instructions of the trial judge bearing thereon; and when it appears from the evidence, charge and circumstances of the case that the verdict had not been prejudicially influenced, a new trial will not be ordered. *Featherstone v. Cotton Mills*, 159 N. C., 429; *Norris v. Cotton Mills*, 154 N. C., 480, cited and distinguished.

2. **Master and Servant—Employer and Employee—Safe Appliances—Minors—Duty of Master—Instructions.**

Where there is evidence tending to show that plaintiff, a 17-year-old lad, was instructed by his superior to operate a rapidly revolving power-driven saw at a grooving machine, against his protest, being inexperienced therein; that the machine, being worn, shaky and antiquated, without proper guards, and being at the time jarred by the slipping of a belt at a neighboring machine, causing the wood thereon to fall upon the revolving saw and thrown violently against the plaintiff, to his injury; that the plaintiff had received no instructions as to operating the machine, and no warning as to its dangers: *Held*, the charge of the court as to the duty of the employer to furnish to his employee reasonably safe appliances to do the work required of him, and to instruct a lad of his age in doing work of this character, is approved. *Ensley v. Lumber Co.*, 165 N. C., 687; *Adkins v. Madry*, 174 N. C., 187, and like cases, cited and applied.

3. **Evidence—Contradiction—Negligence—Subsequent Repairs—Appeal and Error.**

Where there is evidence tending to show that the plaintiff, an employee of the defendant, received a personal injury, caused by the failure of the latter to provide a proper guard for a power-driven saw at a bench he was required to work, and on defendant's behalf that it had provided it, it is competent for the plaintiff to contradict the evidence of the defendant with testimony that these guards had been placed there after the injury; and where this testimony was properly confined strictly to the purpose of contradicting the defendant's testimony or of corroborating the plaintiff's, and was not received as evidence of negligence, no error is found therein on appeal. Competency of such evidence discussed and explained by WALKER, J.

ACTION tried before *Daniels, J.*, and a jury, at September Term, 1918, of LEE.

The plaintiff was employed by the defendant to fire the boiler in its mill, and was ordered, on the day he was injured, to take the place of the man who operated the rip-saw at the bench, or grooving machine, in which it was placed. This saw revolved with great rapidity, 5,000 revolutions to the minute, and there was evidence tending to show that there

was no guard or other appliance to keep the boards from falling on the saw while it was in motion, and that the machine in this respect was not constructed like those of the same kind which were approved and in general use in other mills, and which had protective guards to prevent such accidents as the one in question. The plaintiff was 17 years old when he was injured, and, according to his testimony, had objected to working at the machine, as he was afraid of being cut by the saw, but he was told it was safe and to go on with the work. There also was evidence on defendant's part that there were guards on the machine to hold the boards in their proper position, but plaintiff disputed this and stated that they were put there after he was injured. He had worked at the groover only half a day when he was hurt. He testified, in part, as follows: "I am the plaintiff in this action, 19 years old, and live at Broadway, N. C. About a year and a half ago I worked at Siler City, and was there about a year and a half. I worked about two months with the Oval Oak Manufacturing Company, being hired by Mr. Stone, the superintendent. Mr. Stone looked after the plant and hired and discharged the men. I was firing the boiler, and the man who operated the grooving machine was out, and Mr. Stone put me to work on it. I was scared I'd get my fingers cut, and told him so. He told me there was no danger in the machine. He did not tell me any of the dangers of the machine. He gave me no instructions, but in his presence the fellow that had operated the machine told me to pile up the blank pieces, or work, between the standards and the saw, four wide and four deep, and when he finished, Mr. Stone said, 'That will be right; it will make it out on the truck even.' The machine was a flat table, with a saw coming up through the top of the table, with two pieces on each side of the saw to run the timber up between—to hit the piece exactly in the center—to groove the sides of the washboard. The pieces were about an inch by half an inch and about a foot long. There were no rollers on the table to draw the pieces on the saw. You pushed the piece with your hands, pushing the piece with your thumb and holding it down with your left hand. There were standards, between which I was told to put the finished pieces, but no standards between the blank pieces to be worked and the saw. I was instructed to put the blank pieces between the standard and the saw. There were no standards to protect the work on the side of the saw. I stacked the blanks up as I was instructed to do. I stacked a pile of the pieces up and turned to get my position, and as I did so some of the pieces rolled over on the saw and hit it, and that is the last I know. Just at that time the machine speeded up. I heard it shaking and rattling, and I know of my own knowledge that this was caused by the throwing of a belt on some part of the machinery. The engine caught up slack and shook the machine. I saw the pile as it started to fall and

saw the piece as it started toward me from the saw. The machine was pretty shackly."

Plaintiff here described his wound, which was very severe and caused him great suffering and permanent injury. He then further testified: "I had worked at woodworking plants about two years, but had never operated a machine like this before; never operated a groover. You had to push the blank with your right hand, between little wooden guides, onto the saw and hold them down with your left hand. There was a piece at the end to stop the blank at the right place, and it was grooved only to about six inches of the end. There were four little wire standards on the machine; on the back side you put the timber you had finished and on the far side your raw timber. The finished product was laid over on the other side of the raw material between the little standards. In operating you picked up an unfinished piece next the saw, put it through, and placed it over between the standards. I do not know whether or not a piece dropped diagonally across the guides would touch the saw; I did not mess with it long enough to find out. Mr. Stone showed me how to push the blanks through and to pick them up. I had operated the machine only a half day before and returned to its operation that morning. I did not whistle to Mr. Coggins after I was hurt or have any conversation with him. I do not remember anything that happened until I regained consciousness in the hospital at Greensboro about four weeks afterwards. After the second operation was performed in Greensboro, about September 10th, I was able to go to the moving picture show, and on the 23d I left the hospital. On January 9th I returned to the hospital. I was not fat and weighed only about 120 pounds. I had a piece of gauze in the wound, because the doctor had advised me to do so. In May, after this suit was started, I went to the hospital for another operation, when the wound was closed, and remained there nine days. I then came home. At the time I was hurt I wasn't operating the stock. I was piling stuff and went to turn around. I had used all the timber up and was putting up some more."

(Stick is shown witness.) Do you know whether or not this is the stick which hit you? "No, sir. The stick looks like the ones I handled. Mr. Coggins was working a good ways off. The pieces went into the machine the wide or flat way. I have seen the machine since then. They were not using it when I went to Siler City again. They were using a moulder for this work, through which the piece passed entirely, coming out at the other end. Mr. Stone did not instruct me where to stand. The pieces were stacked at the right-hand side and it was necessary for me to get into the position I was in when hurt in order to get the material and stack it there. The piece which fell on the saw and was thrown back was one of sixteen pieces which were stacked up at the right of the saw."

The allegations of the plaintiff as to the construction of the groover and other material matters were denied by the defendant and testimony introduced to show that there was no negligence either in the construction of the machine or in the failure to give proper instructions as to its operation, and further that the injury was caused by the plaintiff's own negligence.

The jury returned a verdict for the plaintiff upon all the issues, negligence and contributory negligence, and assessed his damages at $5,000. Judgment was entered thereon and an appeal taken by the defendant.

Seawell & Milliken for plaintiff.
Wilson & Frazier for defendant.

WALKER, J., after stating the case: The remarks of counsel with reference to the insurance company by which the defendant was indemnified were not proper, as there was no legal basis for the suggestion, because they were irrelevant to the issues and were calculated to prejudice the jury and to divert the minds of the jurors from the material issues. If the judge had not removed any such prejudice by his clear instructions to the jury as to what were the only issues we would be authorized to grant a new trial, but we are satisfied that the caution of the judge to the jury, which came immediately after the allusion to the insurance company was made, had the desired effect and placed the parties at arm's-length in the very beginning of the trial. We also are convinced that no actual prejudice resulted from the remark, as the verdict upon the issues of negligence was well warranted by the evidence and the damages allowed were very moderate and small in view of the serious, if not horrible, injury inflicted and the racking pain suffered by the plaintiff, which may continue and perhaps will be permanent. To be deprived of the comfort resulting from the normal operation of his physical and bodily functions is a dreadful affliction. Deducting the medical and hospital bills, which were very large, from the amount of damages, the balance was an exceedingly small compensation for the damage done, the painful operations undergone and the long period of confinement and loss of earnings.

With reference to the remarks of counsel this case is not altogether like *Featherstone v. Cotton Mills,* 159 N. C., 429, and *Norris v. Cotton Mills,* 154 N. C., 480, for the inquiries there were not necessarily foreign to the case. In the former case, which may in one aspect apply here, the Court held that on the facts as presented both the questions asked of the jurors, the same being as a rule competent, and that addressed to defendant's counsel were matters which must be left largely to the discretion of the court below, and it must be presumed that the character and good

sense of the jurors selected, when they are properly cautioned, have protected them from improper bias, or that any tendency in that direction has been effectually checked and corrected by the learned and impartial judge who presides at the trial.

In *Lytton v. Mfg. Co.*, 157 N. C., 331, the evidence of the insurance was admitted and the ruling was reversed by this Court, and therefore it does not apply, as in our case the judge intervened and is supposed to have neutralized the prejudice if any had resulted. The penalty for such remarks when not properly and fully corrected by the court and all prejudice removed is a new trial, as was held in *Starr v. Oil Co.*, 165 N. C., 587, where we said: "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause by extraneous considerations which militate against a fair hearing."

And again, to the same effect, in *Deligny v. Furniture Co.*, 170 N. C., at p. 189, we held that whenever such questions are asked, if they are irrelevant to the controversy and have a tendency only to prejudice one side or the other, the presiding judge should act promptly in preventing any such result and take drastic measures to do so if necessary. When it is clear that either of the parties resorts to such questions to gain an unfair advantage it is done at the sacrifice of the verdict, if he succeeds in securing one, on account of the very dangerous character of the questions. *Lytton v. Mfg. Co., supra.* The subject is fully discussed in the cases we have cited and needs no further elaboration.

In this case we see no reason for such a course. Counsel here may not have intended any wrong, and we can draw no inference that they did from what was said. They may have asked the question for a legitimate purpose to obtain information in the proper conduct of their case. But for the objection the answer might have been that defendant had no indemnity insurance. The defendant felt aggrieved by the question and prayed for the intervention of the court and relief was speedily granted by the learned presiding judge. Parties should act promptly, as was done here, in the assertion of their rights. This being an appellate tribunal, with jurisdiction merely for the correction of errors in law, it will not grant the relief which can the more readily be given by the court below in the exercise of its sound discretion, unless in very exceptional cases, of which this is not one. We caution the judges, though, to guard carefully the rights of the parties when such questions arise and to be prompt in eliminating from the trial anything tending to prevent an impartial hearing and verdict. It may be that in some cases, where the reference to insurance is clearly irrelevant and can only have the effect to prejudice the opponent, the judge should be even drastic and

order a continuance, at plaintiff's cost, as it may do incalculable damage. *Lytton v. Mfg. Co., supra.*

The other exceptions relate mainly to the charge of the court upon the question of negligence. We have examined the latter with the utmost scrutiny and have been unable to find any departure from the principles which have been settled by this Court as applicable to cases of this kind. It covered the entire inquiry and presented to the jury in clear and vigorous language every question raised by the pleadings and evidence and explained the law and the testimony of the witnesses in perfectly correct manner, as required by the statute.

The case in all of its essential features is like *Ensley v. Lumber Co.*, 165 N. C., 687, and *Dunn v. Lumber Co.*, 172 N. C., 136. It resembles the former case very much, and sufficiently so to be controlled by it. The plaintiff in that case, who was injured, was seventeen years of age and was hurt in a way and under circumstances somewhat similar to those set forth in this record. We held in the *Ensley case:* It is the duty of the master to exercise due care in furnishing his servant with a reasonably safe place to work and reasonably safe and proper machines, tools and appliances with which to do the work, and in the case of youthful or inexperienced employees this further duty rests upon him: Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such danger, it is his duty to give him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand his perils. But the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him if he in fact knows and appreciates the dangers of the employment, and generally it is for the jury to determine whether under all the circumstances it was incumbent upon the master to give the minor, at the time of his employment or at some time previous to the injury, instructions regarding the dangers of the work and how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience and want of capacity, and as will enable him, with the exercise of ordinary care, to perform the duties of his employment with reasonable safety to himself. 26 Cyc., 1174-1178; *Turner v. Lumber Co.*, 119 N. C., 387; *Marcus v. Loane*, 133 N. C., 54; *Walters v. Sash and Blind Co.*, 154 N. C., 323; *Fitzgerald v. Furniture Co.*, 131 N. C., 636; *Rolin v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 350. Those cases fairly illustrate the rule as it has been applied by this Court, and the *Fitzgerald case* would seem to be essentially the same in its salient facts as this one, and if not entirely so there is a

sufficient likeness between them to make it a controlling authority. The authorities elsewhere are in harmony with our decisions.

The following additional authorities, which state the law as held and applied in other jurisdictions, will be found applicable to our case:

The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. The duty of the employer to take special cautions in such cases has sometimes been emphatically asserted by the courts. Cooley on Torts, p. 652.

The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor is this all: the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him and to place him, with reference to it, in substantially the same state as if he were an adult. Thompson on Negligence, 978.

When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children, wherever they go, must be expected to act upon childish instincts and impulses—a fact which all persons who are *sui juris* must consider and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character and one likely to do an injury to the child itself or to others is liable in damages for injury resulting which is a natural result of the original wrong, though there may be an intervening agency (of the child) between the defendant's act and the injury. Bailey on Personal Injuries, 1291.

It was said in *R. R. v. Fort,* 84 U. S., 553, in which a parent was suing for injuries to his son, who was sixteen years old: "This boy occupied a very different position (from an adult). How could he be expected to know the perils of the undertaking? He was a mere youth without experience, not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which in its very nature was perilous and which any man of ordinary sagacity would know to be so."

It is the duty of one who employs young persons in his service to take notice of their apparent age and ability and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they ought not to be exposed. This is a duty which cannot be delegated, and any failure to perform it leaves the master subject to the same liability with respect to such risks as if the child were not a servant. For this purpose the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be reasonably sure that they understand it and appreciate the danger. The principles governing the employment of minors are to a large degree also applicable to the employment of inexperienced, ignorant, feeble or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant and to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant he must give the servant explicit warning of the danger and not allow him to undertake the work without a full explanation of its perils.

And this may also be said upon another branch of the case, viz., whether the groover was constructed after the pattern of those which have been approved and are in general use. There was evidence that it was not similar in the very respect which, if it had been, the boards could not have been jostled onto the saw. There also was testimony that the machine was old, out of style, and shaky or rickety, and not fit to be placed in the hands of a comparative novice with only one-half's day's experience, and working, too, under an express order to go ahead, after making objection because of the risk and being assured of safety. *Atkins v. Madry,* 174 N. C., 187.

The defendant must have known of the dangerous character of the groover. It had been in use for a long time and was out of date—evidently an antiquated model—and a trap for the inexperienced and unwary. It was also cranky from constant wear and tear. Besides, it was rendered more unsteady by the slipping of a belt from an adjoining pulley, which was operated by the same engine, which accelerated its speed and violently agitated the groover, or at least helped to cause the boards to lose their balance and fall upon the saw. There was full evidence of these and other facts, more or less showing negligence of the defendant and disproving contributory negligence. In this conflict the

case was evidently one for the jury to settle under the correct instructions of the court.

One witness, Mr. Gregson, testified that within a thirty years experience in such mills he had seen many such machines and practically every one had the groove saw protected, so that the boards could not drop down and upon the saw.

The case of *Dunn v. Lumber Co.,* 172 N. C., 137, is also directly in point and strongly supports the view that upon plaintiff's evidence, if accepted as true by the jury, which was done here, he was entitled to recover for the injury he suffered. We have so fully and exhaustively discussed in that and *Ensley v. Lumber Co., supra,* the general and prevailing principles applicable to this class of cases that we forbear to prolong this opinion by any further reference to them.

We held in the recent case of *Ammons v. Mfg. Co.,* 165 N. C., 449, that repeated adjudications had established the rule we have stated, and that an employer of labor, in the exercise of reasonable care, must provide for his employees a reasonably safe place to do their work and supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision. *Pigford v. R. R.,* 160 N. C., 93; *Young v. Fiber Co.,* 159 N. C., 376; *Alley v. Pipe Co.,* 159 N. C., 327; *Patterson v. Nichols,* 157 N. C., 406; *Mercer v. R. R.,* 154 N. C., 399; *Marks v. Cotton Mills,* 135 N. C., 287.

The remaining objection is equally untenable. The change in the machine, by putting up guards to keep the boards in their place, was shown by the plaintiff, not to prove an admission that the groover was defective when he was hurt, but to show merely the difference in conditions in order to support plaintiff's testimony that they were not there when he was hurt by the saw hurling the board against his body. It was defendant's object to contradict him as to the guards not being there when he was operating the machine, and we have held frequently that this may be done for that purpose and not as an admission of negligence. Such evidence, for the purpose just indicated, was held to be competent in *Pearson v. Clay Co.,* 162 N. C., 224; *Boggs v. Mining Co., ibid.,* 393; *McMillan v. R. R. Co.,* 172 N. C., at pp. 856, 857, and *Muse v. Motor Co.,* 175 N. C., 466, where it is said, at p. 469: "It was competent to show that the repairs were made afterwards, not that the repairs were evidence tending to prove negligence, but simply to prove their date to contradict the defendant's witnesses," citing *Tise v. Thomasville,* 151 N. C., 281; *Westfeldt v. Adams,* 135 N. C., 591. But *West v. R. R. Co.,* 174 N. C., 125, is exactly in point and fully sustains the judge's ruling. It is there said by the Court, at pp. 130 and 131: "The

question of evidence raised by the defendant, which is that the court admitted incompetent evidence as to the condition of the track and roadbed at the time of the injury, and its reparation since that time, is founded upon a misapprehension as to the true nature of the evidence. It was not admitted as an implied admission of negligence on the part of the defendant, but as tending to corroborate the plaintiff as a witness in his own behalf as to their condition at the time of the accident, and the instructions to the jury clearly show that the evidence was let in solely for such purpose. In that view it was competent, as we have held," citing *Shaw v. Public Service Corporation,* 168 N. C., 611, and the cases in this opinion, *supra.*

The remaining exceptions, which are not merely formal, are considered by us to be without any real merit and were not stressed in this Court.

The case has been fairly and correctly tried, and we find no reason for disturbing the judgment.

No error.

MRS. MINNIE J. WELDON, ADMINISTRATRIX, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 March, 1919.)

1. Verdict—Interpretation—Evidence—Instructions.

The verdict of a jury must be interpreted on appeal and allowed significance by proper reference to the testimony in the case and the judge's charge thereon.

2. Same—Negligence—Contributory Negligence—Assumption of Risks.

Where the verdict of the jury, under conflicting evidence and a correct charge upon the issues of negligence and contributory negligence, establishes the fact that the death of plaintiff's intestate, a flagman on defendant railroad company's freight train, was caused by his being thrown from the steps of the caboose car, while he was engaged in his duties, to his death by the violent, sudden and unusual movement of the train, the element of assumption of risks is eliminated and an exception that the charge erroneously confined the scope of the inquiry thereon is untenable on appeal.

3. Appeal and Error—Negligence—Contributory Negligence—Instructions—Evidence.

Where the evidence tends only to show that the plaintiff's intestate was thrown to his death while standing on the steps of the caboose car to a freight train, holding to a grab-iron, preparatory to getting off, in the usual course of his employment, to throw a switch; that the conductor had locked the car behind them and was standing behind him at the time: *Held,* exception that the charge failed to submit to the jury the question of intestate's contributory negligence in not holding to the grab-iron and in going upon the steps is unsupported by the evidence and untenable.

APPEAL by defendant from *Kerr, J.*, at the September Term, 1918, of WARREN.

This is an action brought by Minnie J. Weldon, administratrix of the estate of Claude T. Andrews, to recover damages for the death of Claude T. Andrews, which was alleged to have been caused by his being thrown under the wheels of the car by the sudden stopping of a freight train on which he was employed by the Seaboard Air Line Railway Company as flagman at Norlina, N. C., on 1 November, 1917. The leg of the plaintiff's intestate was run over by the wheels of the caboose on defendant's freight train and so mangled that amputation was necessary. He was carried from Norlina to Raleigh, his leg was amputated, and he died as the result of the injury on 4 November, 1917.

The intestate was a flagman on the train, which was preparing to stop in order to put it on a siding at Norlina. The train was in charge of C. L. Jeannette, conductor. As the train approached Norlina the conductor and the intestate were in the caboose. Both of them left the caboose and the conductor locked the door.

The conductor, a witness for the defendant, testified, among other things: "As we neared the switch Andrews and I came out of the caboose. He was first and went down on the step and I stood above him; as we got near the switch I held my hand over Andrews' shoulder and gave the signal to slow the train. . . . When he fell there was no jolt of the train that I could discover, and I was standing on the step above him; he was standing on a lower step preparing to get off. It was his place to get off and open the switch; his duty was to get off on the ground safely, as I was to do."

The evidence for the plaintiff tended to prove that the train was moving at a high rate of speed and was stopped so suddenly and with such violence that the intestate was thrown from the train and was injured, while the evidence of the defendant tended to prove that the intestate jumped from the train.

His Honor charged the jury upon the issue of negligence as follows: "If you find from the evidence and by its greater weight, as I have defined to you, that the defendant carelessly and negligently attempted to stop its train upon which plaintiff's intestate was brakeman, and while so attempting to stop its train caused said train to suddenly and violently check up or stop in such an unusual and extraordinary manner as to cause plaintiff's intestate to be violently thrown off the car upon which he was riding, or preparing to alight from, and under the said car, and find that this said negligent, violent and sudden stopping or slowing up of said train was the proximate cause of the plaintiff's intestate being ejected from the train and run over, then you will answer this first issue 'Yes.' If you do not so find you will answer 'No.'" There was no exception to this charge.

This is the only charge upon the issue of negligence except certain general charges defining negligence and proximate cause.

The court also instructed the jury on the second issue as to contributory negligence as follows: "Now as to this issue the burden shifts to the defendant company to satisfy you by the evidence and by its greater weight, as I have defined the same to you, that plaintiff's intestate's injuries and subsequent death was due to his own negligence, in that he carelessly and negligently stepped off defendant's moving train and was thrown down and under same and his leg was cut off, from which injury he died a few days thereafter; if you so find, then you should answer this issue as to contributory negligence 'Yes.' If you do not so find, then you should answer 'No.' "

The defendant excepted to this charge upon the ground that it made the contributory negligence of the plaintiff dependent on his jumping from the train and left out of consideration the allegations of negligence in the answer that the intestate assumed a position on the steps of the caboose while the train was in motion and before it had come to a full stop, and that he failed to hold to the grab-iron on the caboose.

His Honor also instructed the jury on the third issue as to assumption of risk as follows: "The burden is upon the defendant to satisfy you, and by the greater weight of the evidence, that plaintiff's intestate assumed the ordinary risk and hazards incident to his occupation and employment, and which are known to him and are plainly observable, and that the occurrence which threw him from the train was a risk or hazard which he assumed ordinary and incident to his employment in some degree; if you so find you will answer this issue 'Yes'; if you do not so find you should answer this issue 'No.'

"If you find from the evidence and by its greater weight, as I have defined the same to you, that plaintiff's intestate was injured by the negligent conduct of the defendant company, or its agents, or its employees, in stopping or attempting to stop its train in such a manner as to violently throw plaintiff's intestate off the train, you should answer this third issue 'No,' for this doctrine does not include extraordinary risks which an employee does not assume and has no application to injuries which an employee may receive from a negligent act of his master or that of another to whom the master had delegated a duty as his employee." The defendant excepted.

The ground of exception to these instructions upon the third issue is that his Honor confined the doctrine of assumption of risk to those that were ordinary and usual and did not tell the jury that the intestate under certain conditions assumed extraordinary risks of the employment.

The jury returned the following verdict:

1. Was the plaintiff's intestate, Claude T. Andrews, injured by the

negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did plaintiff's intestate, Claude T. Andrews, by his own negligence contribute to his injury? Answer: "No."

3. Did the plaintiff's intestate, Claude T. Andrews, assume the risk of injury? Answer: "No."

4. What damage, if any, is plaintiff entitled to recover? Answer: "$5,000."

Judgment was entered in favor of the plaintiff upon the verdict, and the defendant excepted and appealed.

Charles J. Katzenstein, Tasker Polk, and W. E. Daniel for plaintiff.
Murray Allen for defendant.

ALLEN, J. As stated in *Jones v. R. R.*, 176 N. C., 260, "It is the accepted principle in our procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and charge of the court," and when so considered, the verdict in this case establishes the fact that the plaintiff's intestate had gone upon the steps of the caboose in company with the conductor and in the performance of his duty, and while on the steps he was thrown to the ground and under the train because the train was checked and stopped in an unusual and extraordinary manner.

The court charged the jury that they could not answer the first issue in the affirmative unless the defendant "caused said train to suddenly and violently check up or stop in such an unusual and extraordinary manner as to cause plaintiff's intestate to be violently thrown off the car upon which he was riding," and the finding upon the first issue in response to this charge disposes of the defendant's exceptions to the charges on the issue of assumption of risk because, as held in the *Jones case, supra,* the employee does not assume the risk "in cases of unusual and instant negligence and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must come in time to be of use."

Substantially the same objection was made to the charge of the court in the *Jones case,* and the Court, dealing with the exception of the defendant, said, "But having restricted the fact of liability on the first issue to the single question whether the engineer made the flying switch negligently by bringing his engine to an unnecessary and unusual and sudden stop, and this having been determined in plaintiff's favor, the court, under the authorities, was justified in ruling that there could be

no assumption of risk, and his definition was without appreciable significance and should not be allowed to effect the result."

This fits the facts of the present case and would have justified his Honor in going further than he did, and in instructing the jury that if the intestate of the plaintiff was thrown from the train by reason of an unusual and extraordinary stop, which is the finding on the first issue, that there would be no assumption of risk. The authorities supporting this principle are cited and discussed in the learned and valuable opinion of *Associate Justice Hoke* and the case of *Boldt v. R. R.*, 245 U. S., 442, on which the defendant relied, is considered and distinguished.

The exception to the charge on contributory negligence, in that the court failed to submit to the jury the alleged negligence of the intestate in going upon the steps and in not holding to the grab-iron, is not supported by the evidence as the conductor testified that he had locked the door of the caboose, thereby forcing the intestate either upon the platform or the steps, and that the intestate was standing on the steps in order that he might alight in the performance of his duty to open the switch, and the evidence shows that he had hold of the grab-iron when he was thrown from the train. We see nothing in this tending to prove negligence.

No error.

J. J. NALL ET AL. V. M. BROOKS McMATH ET ALS.

(Filed 5 March, 1919.)

1. Appeal and Error—Verdict—Evidence—Objections and Exceptions.

Objection that a verdict is not supported by any legal evidence comes too late after its rendition; and this doctrine applies where the jury has asked further instructions while considering the case, as to whether they were confined to the contentions of the parties as to the true divisional line between owners of adjoining lands, in the presence of attorneys of each of them, who agree in an instruction that the jury shall find the line, but upon the evidence in the case.

2. Verdict—Evidence—Lands—Dividing Lines.

Where the jury has disregarded the contentions of the parties in locating the true divisional line in dispute between the lands of adjoining owners, and has established the line between those claimed, evidence that the acreage exceeded that called for in the deeds of each of the parties, that allowances should be made for variation in the compass, and that the distances were greater than given in these deeds is *held* sufficient.

3. Verdict—Compromise—Evidence—Appeal and Error.

A compromise verdict arbitrarily rendered and not supported by any legal evidence will be set aside.

4. Judgments—Non Obstante—Motions—Appeal and Error.

A motion for judgment *non obstante veredicto* will not be sustained unless it appears from the pleadings and verdict, and not from the evidence, that the party is thereto entitled.

APPEAL by defendants from *Daniels, J.*, at the August Term, 1918, of CHATHAM.

This is a special proceeding instituted before the clerk for the establishment of the dividing line between the respective parties. The case was heard before the clerk after the survey had been made and the surveyor had filed his report, and he decided in favor of the contentions of the defendant. The plaintiffs appealed and the cause was transferred to the trial docket, and when the same was called for trial before his Honor he referred the same to R. H. Dixon, Esq., as referee to hear the evidence, find the facts and report his findings of fact and conclusions of law. The said reference was a compulsory one.

The referee made his report to the court, again finding in favor of the defendants. To this report the plaintiffs filed exceptions, proposed an issue and demanded a trial by jury thereon, and the cause came on for hearing on the said exception of the plaintiffs. After the jury had retired for some hours one of the jurors approached the judge and after a short conference the judge called counsel for both parties to the bench and told them that the juror wished to know if they had a right to disregard the contentions of both parties and to establish the line at a point different from that contended by either, the judge asking the counsel what they thought should be his instruction, if anything, whereupon the counsel for the defendant suggested that under the word of the issue he thought all he could tell the jury was that they could begin the line where they chose, and found from evidence to be true point; that it was their duty to find from the evidence what was the true dividing line and to so declare. This proposition was not objected to as to the judge's duty in response to the juror's inquiry, but neither side consented as to where they should find the line, nor did either side consent that they should find the line, except as to where they should find it under the evidence. There was no consent on either side or suggestion as to what the verdict should be or where they should find the line, and there was no request for such consent from inquiring juror as to his province. When the jury returned they stated to the court what they had decided, and the court in helping the jury with its findings asked them if they meant to divide the disputed land, to which they replied in the affirmative. The attorneys for both sides aided the court in suggestions as to what they understood the jury wanted to do while the jury was standing in the bar waiting for the court to aid them in getting their answer as they wished it, but there was no consent or intimation of consent from

either side that such should be their verdict or that they were satisfied with it.

The evidence of the plaintiffs tended to prove that the true line was from 6 to 7 on the plat, and that of the defendants that it was from 9 to 10. The jury returned a verdict establishing the line equally distant from 6 to 7 and 9 to 10.

The defendants moved to set aside the verdict upon the ground that there was no evidence to support it, which motion was refused, and defendants excepted. Judgment was entered in accordance with the verdict and the defendants appealed.

W. P. Horton and Fred W. Bynum for plaintiffs.
Siler & Barber and R. H. Hayes for defendants.

ALLEN, J. The principle is well established that an objection that there is no evidence to support a verdict will not be considered when made for the first time after the verdict has been returned (*S. v. Leak,* 156 N. C., 643), and there is no reason for refusing to enforce the rule when it appears, as it does in this record that both parties had full notice that the jury was not satisfied to find the true line to be as contended for by either party, and when not only was there no opposition to a departure from these contentions and no request to instruct the jury they must find according to the contention of one or the other, but on the contrary counsel on both sides aided the court and jury in framing the answer to the issue, without suggesting that there was no evidence to support this finding until after the return of the verdict.

We have, however, examined the evidence and cannot say that the jury has not established the true line between the parties. It is true that most of the evidence was directed to the lines according to the respective contentions of the plaintiffs and the defendants, but the surveyor testified that the acreage of the plaintiffs and defendants exceeded that called for in their deeds and a number of deeds were introduced by both parties which required allowances for variations in the compass, and as to the deeds of both plaintiffs and defendants the distances, in order to reach their respective claims, required more than was called for in the deeds.

We would not be understood as holding that the jury has the right to compromise the claims of litigants, and if it clearly appeared that they had done so and had returned the verdict with nothing to sustain it, and that there was no notice of the purpose to do so, the parties would be entitled to relief.

The motion for judgment *non obstante veredicto* has nothing to sustain it, as this motion can only be granted when it appears from the

pleadings and the verdict, and not from the evidence, that the party is entitled to judgment. *Baxter v. Irwin,* 158 N. C., 277.

The judgment must be affirmed.

No error.

EMMA FLEMING ET ALS. v. S. A. CONGLETON ET ALS. INDIVIDUALLY AND AS BOARD OF COMMISSIONERS OF PITT COUNTY.

(Filed 12 March, 1919.)

1. Election—Inconsistent Remedies.

The doctrine of election rests upon the choice of the party between two or more inconsistent remedies available to him.

2. Same—Counties—Highways—Damages—Statutes—Actions—Estoppel.

Where an owner has withdrawn, without objection, proceedings authorized by a public-local law which he has started before a county board of commissioners for taking his lands for a public highway he may pursue his common-law remedy in the Superior Court upon substantially the same facts and for the same relief, the two remedies being consistent with each other, and the proceedings under the statute will not operate as a bar to the common-law action in the court.

APPEAL by defendant from *Whedbee, J.,* at the August Term, 1918, of PITT.

This is an action to recover damages of the defendant, Pitt County, for constructing a new road through the property of the plaintiffs. When the case was called for trial and the pleadings read the defendants demurred *ore tenus* and moved to dismiss for that the plaintiffs had not complied with the Public Laws of 1905, ch. 714, sec. 8, in that they had filed their petition with the board of commissioners at the May Term of said board in 1915.

The petition filed with the board of commissioners on 3 May, 1915, was as follows:

To the Board of Commissioners of Pitt County:

Maggie L. Fleming and Emma L. Fleming respectfully showeth to your honorable board the following facts:

1. That they own a body of farming lands situated in Greenville Township, Pitt County, North Carolina, and that the public road force, building public roads in Greenville Township, Pitt County, North Carolina, have entered upon said tract of land and have laid out and constructed a public road thereon, being the new road laid out beyond House

Station, and in so doing have taken and appropriated to the public use a portion of said lands about 36 feet wide and about 1,435 yards in length, which aggregates between three and four acres of land.

2. That the taking of said portion of land was without the consent of the owners thereof, to wit, Maggie L. Fleming and Emma L. Fleming.

3. That the changing of the old course of the public road along said lands and the laying out of said new road over said lands greatly inconveniences your petitioners in the management and cultivation of said lands, and your petitioners pray:

That they be compensated for the land so taken and for the damages and inconveniences sustained by reason of the taking of said land and the construction of said road, and these petitioners aver that their damage so sustained exceeds $500, but they hereby offer and consent to accept the sum of $500 in compromise of their said claim, provided their honorable body will pay the same without litigation.

This the 3d day of May, 1915. MAGGIE L. FLEMING.
EMMA L. FLEMING.

Upon the filing of the petition the board of commissioners issued an order to the sheriff to summon three freeholders to go over the road and assess the damages.

In compliance with the said order of the board of commissioners, the sheriff summoned a jury of three men, who assembled at the courthouse, and after being sworn and declared themselves ready to hear the case the plaintiffs' counsel appeared before the said board and withdrew his petition, to which the defendant did not object. This action was then commenced.

The only exception taken on the trial was to the refusal of the court to sustain the demurrer made at the beginning of the trial. There was a verdict in favor of the plaintiff and judgment given accordingly, and defendant appealed.

F. C. Harding and Harry Skinner for plaintiff.
S. J. Everett for defendant.

ALLEN, J. The road law of Pitt County (Public Laws 1905, ch. 714, sec. 8) provides that where any person across whose land a road is located claims damages and files his petition therefor the board of commissioners shall order a jury of three freeholders to be summoned, who, after notice to the owner, shall assess the damages, and gives the right of appeal to the owner of the land to the Superior Court, where the petition is heard before a jury *de novo;* but this statutory remedy is not exclusive and does not prevent the owner from resorting to the common-

law remedy to recover damages by action in the Superior Court. *Mason v. Durham,* 175 N. C., 641, approved in *Keener v. Asheville, ante,* 1.

It follows therefore that the plaintiffs have stated a cause of action in their complaint within the jurisdiction of the court, and that they have the right to pursue their remedy by action unless prevented by filing their petition before the board of commissioners, the defendant contending that having two remedies and having elected to ask for the assessment of damages under one they cannot demand redress under the other.

The doctrine of the election of remedies is "generally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions" (9 R. C. L., 957), and it "applies only where there are two or more remedies, all of which exist at the time of election and which are alternative and inconsistent with each other, and not cumulative, so that after the proper choice of one the other or others are no longer available. This is upon the theory that of several inconsistent remedies the pursuit of one necessarily involves or implies the negation of the others." 9 R. C. L., 958. This is the accepted doctrine in this Court. *Machine Co. v. Owings,* 140 N. C., 504; *Pritchard v. Williams,* 175 N. C., 322.

In the first of these cases *Justice Hoke* states the principle as follows: "As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and if not satisfied with the result of that he may commence and carry through the prosecution of another. . . . In 3 Words and Phrases Judicially Defined, p. 2338, it is said: 'The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies.' These statements of the doctrine are supported by well-considered decisions and are very generally accepted as correct. *Whittier v. Collins,* 15 R. I., 90; *Bacon v. Moody,* 117 Ga., 207; *Austen v. Decker,* 109 Iowa, 109; *Black v. Miller,* 75 Mich., 323."

This is quoted with approval in the second case, and the Court adds, "It is only when two rights are inconsistent that the party is put to his election, and that the exercise of one or the failure to do so bars the other."

The *Machine Co. case* is also reported in 6 A. & E. Ann. Cases, 212, and the editor says in the note appended, "The rule stated in the reported case that the doctrine of election of remedies applies only when the remedies invoked are inconsistent, and that when the remedies are consistent all may be pursued, finds affirmance in numerous decisions," and he cites

decisions from the highest courts of nineteen States and from the Supreme Court of the United States in support of the text.

Applying this principle, it is clear that filing the petition before the commissioners, conceding it to have been filed under the statute, which the plaintiffs deny, and which was withdrawn before the present action was commenced without objection by the defendant is no bar to the present action because the two remedies are consistent, both having the same purpose in view—the recovery of damages for an entry upon the land of the plaintiffs, based on substantially the same facts.

There is therefore no error in the judgment appealed from.

No error.

R. C. PRIDGEN AND J. R. BARDEN v. J. P. LONG AND N. P. JARMAN.

(Filed 12 March, 1919.)

1. Fraud—Deeds and Conveyances—Intent—Appeal and Error.

Where damages are sought in an action against the grantor in a deed conveying land, for falsely and fraudulently representing that he had a good and indefeasible title to the same, the question is presented for the consideration of the jury as to whether there was a false assertion of title which was calculated to deceive, made with the intent to do so, and which was relied upon by the grantee, who was thereby misled to accept the title to his injury; and the exclusion by the trial judge of evidence as to the intent of the grantee in making the assertion of title in himself is reversible error.

2. Fraud—Intent—Evidence—Deeds and Conveyances—Mortgages—Mortgagor and Mortgagee—Title.

While the transfer of notes secured by a deed of trust, together with assignment of the mortgagee's interest, which was endorsed on the mortgage by the mortgagee to the mortgagor, does not, under our decisions, reconvey the title to lands, which continues in the trustee, a representation by the mortgagor, a layman, that he is the owner of the unencumbered fee-simple title, when conveying it to a third person with covenants and warranty of titles, does not of itself or as a matter of law disclose a fraudulent intent, so as to exclude, under competent evidence or the circumstances attending the transfer, the element of fraud from the consideration of the jury under the doctrine that ignorance of the law excuses no one.

3. Same—Equity—Purchase—Covenants—Warranty—Measure of Damages.

Where the action is brought against a grantor of lands by deed containing covenants of seisin and warranty of a fee-simple absolute title to lands to recover damages for falsely and fraudulently representing that he had an unencumbered fee-simple title thereto the action is upon the fraud, and not upon the covenants of the deed, in which latter case a different rule obtains, and an instruction by the court to the jury that the

measure of damages is the amount paid by the grantee for an outstanding equity to perfect his title, leaving out of consideration whether the price so paid was a reasonable amount, fairly and honestly paid, is reversible error.

4. **Deeds and Conveyances—Fraud—Mortgages—Equity—Title—Purchase—Covenants—Warranty—Seisin—Possession.**

In an action for a breach of covenant of quiet enjoyment of the lands conveyed by deed, the plaintiff must show an eviction by the owner of a paramount title, the measure of damages being the amount of the purchase money paid for the land, with interest; but in an action upon a covenant of seisin it is only required that the plaintiff show that the defendant had no title or right to convey, the general rule as to the measure of damages being the same in both actions, with the exception that where there is a failure of title to only a part of the land conveyed the plaintiff can recover a proportionate part of the purchase money, and where the plaintiff has necessarily advanced money to remove an encumbrance the measure of damages is limited to the amount actually and reasonably paid, not exceeding the purchase money and interest.

5. **Deeds and Conveyances—Covenants—Seisin—Breach.**

A covenant of seisin in a deed to lands implies that the covenantor then had not only the possession, but the right to possession; in this State a covenant of title, not merely of possession, being synonymous with the covenant of the right to convey, and it is broken by the grantor, not owning the title, at the time he made the deed.

6. **Deeds and Conveyances—Fraud— Title— Misrepresentations— Investigation—Accord and Satisfaction—Pleadings—Instructions.**

Held, upon the facts appearing in this action to recover damages for the alleged fraudulent representation of the grantor as to his title to the lands conveyed by deed with covenants of warranty and of seisin to the effect that he owned the fee-simple title, the questions of whether the grantee relied upon the grantor's misrepresentations of title or was concluded by an independent investigation thereof in the books in the register of deeds office, or whether a settlement in accord and satisfaction had been made between the parties will be raised in the further development of the case at the trial, when properly pleaded, by requests for special instructions upon issues presenting them.

7. **Deeds and Conveyances — Fraud — Caveat Emptor— Title— Covenants—Warranty.**

The maxim of *caveat emptor*, in the absence of fraud, applies to contracts of purchase both as to real property and personal property at law and in equity, the contract as to land becoming executed when the conveyance has been duly delivered, and then the purchaser's only rights of relief for defects or encumbrances depends solely upon the covenants contained in his deed.

8. **Same—Presumptions—Honest Dealings—Rule of the Prudent Man.**

Applying the doctrine of *caveat emptor* where the grantee has fraudulently conveyed an unencumbered fee-simple title to lands that he did not have, it is only required of the grantee that he should have used the reasonable care and diligence of an ordinarily prudent man in conducting the transaction, it being presumed that men will act honestly in their business

dealings, and he is not required to suspect that his grantor is acting otherwise.

APPEAL by plaintiffs from a judgment rendered by *Allen, J.*, at September Term, 1918, of DUPLIN.

On 12 February, 1911, John R. Barden, being the owner in fee simple of the tracts of land in controversy, conveyed the same to R. C. Pridgen for the consideration of $2,000, his wife joining in the deed, which was duly recorded on 6 September, 1911; and on 12 February, 1911, R. C. Pridgen reconveyed the same land, by way of mortgage, to John R. Barden to secure ten notes of $200 each due at stated times from 1911 to 1920. This mortgage was registered 9 March, 1911.

On 5 September, 1911, R. C. Pridgen conveyed the same land to J. P. Long, in consideration of $3,000, and the deed was recorded on 7 September, 1911. On 5 September, 1911, J. P. Long and wife, Willie Long, reconveyed the land to R. C. Pridgen by a mortgage to secure $2,500, evidenced by ten notes due on different dates between January, 1913 and 1922. R. C. Pridgen then, on 15th September, assigned the ten notes and mortgage to J. R. Barden, who paid him for the same, but Pridgen did not transfer the legal title which he held as mortgagee. Long took possession of the property and remained there until about the first of November, 1911, and then surrendered the possession of the land to Barden under an agreement, as alleged by Barden, that Barden was to make improvements and was to sell the land, Long to give him a deed for his equity of redemption, and under this agreement Barden went into the actual possession of the land and remained in possession until 11 November, 1915, when Barden and wife conveyed to the defendant Nelson P. Jarman and wife, Marie C. Jarman, and Barden put them in possession of the premises, and they have remained there ever since without being disturbed by any one.

On 10 July, 1915, J. R. Barden and R. C. Pridgen instituted a suit in the Superior Court of Duplin County against J. P. Long and Willie Long, and duly filed their complaint on 10 July, 1915, in the office of the Clerk of the Superior Court. Long and his wife filed their answer on 21 August, 1915, and at the March Term, 1917, the case came on for trial between Pridgen and Barden as plaintiffs and Long and wife as defendants, and at this term the court ordered a mistrial and made Jarman and wife parties to the action.

On 4 April, 1917, the defendants Jarman and wife filed their answer and therewith commenced proceedings for arrest and bail against John R. Barden, alleging that they paid Barden $3,500 for the land and took his deed with full covenants of warranty and seisin, and further that Barden "specifically and emphatically" declared to them and to their

attorney, Frank L. Potter, that he was the absolute owner of the lands in fee simple, and that there were no encumbrances or liens upon the same, which assurances and representations were relied upon by these defendants, and were false and fraudulent.

The plaintiffs, Pridgen and Barden, filed replies thereto, denying that any false representations were made, and upon all these pleadings the case came on for trial at the August Term, 1918, when the court submitted the three issues set out in the record, to which the plaintiff John R. Barden excepted.

This action, it is alleged, was brought by Pridgen and Barden for the purpose of foreclosing the mortgage made by Long and wife, and to acquire the equity of redemption of the mortgagors for the purpose of perfecting the title in Barden and for the benefit of Jarman and wife. The defendants Jarman and wife filed an answer, setting up the fraudulent representations and alleging that Barden was not seized and possessed of any interest whatever in the said lands, and also alleging that John R. Barden delivered to the defendant Jarman and wife the notes and mortgage given by J. P. Long to R. C. Pridgen and assigned by the latter to him.

Among other instructions, the court charged the jury as follows:

"The deed from the plaintiff Barden to the defendant Jarman conveyed nothing, in so far as the land referred to therein is concerned, but only had the effect of transferring to the defendant Jarman his rights as owner of the notes in question, and no title to the land was conveyed thereby. So I charge you, upon the admitted facts in the pleadings, that in so far as Barden was not the owner of the said land at the time of the sale to Jarman, and inasmuch as he covenanted in the deed that he was seized of said lands, as set out in the answer of the defendant Jarman, there was a breach of said covenant immediately upon the execution of the said deed—that is, the said covenant of seisin—and that the defendant Jarman is therefore entitled to recover of the plaintiff Barden such damages as arose naturally from said breach of covenant just referred to. I charge you further that the defendant Jarman had a right to buy any outstanding title to said lands, in order to protect himself against encumbrances, and that the measure of damages in this case is the amount paid by Jarman in order to protect his title, so long as it does not exceed the total purchase price paid to plaintiff Barden."

The jury returned the following verdict:

1. Did the plaintiff Barden, at the time of the sale of the lands in controversy to the defendant Jarman, falsely and fraudulently represent to the defendant Jarman that he was the absolute owner of the land in controversy, and that the same was free of all encumbrances? Answer: "Yes."

2. Did the defendant Jarman rely upon said representations and purchase said land, believing that Barden was the owner thereof in fee simple? Answer: "Yes."

3. What damage, if any is the defendant Jarman entitled to recover of the plaintiff J. R. Barden? Answer: "$800, with interest."

Judgment upon the verdict, and appeal by John R. Barden, one of the plaintiffs.

The other facts are stated in the opinion of the Court.

Stevens & Beasley and Murray Allen for plaintiff J. R. Barden.
Grady & Graham for defendant Jarman and wife.

WALKER, J., after stating the case: The court was trying an issue of fraud, whether the plaintiff John R. Barden had falsely and fraudulently represented that he had a good and indefeasible title to the land. The intent of Barden to deceive and cheat the defendant Jarman was an essential ingredient of the alleged fraud. This allegation of fraud was the only one submitted to the jury. The question, therefore, was whether there was a false assertion of title made which was calculated to deceive, and with intent to deceive, the defendant, and upon the truth of which the latter relied and was misled thereby to accept the title to his injury. The important element, as to the fraudulent purpose, required that all the relevant facts bearing on it should be submitted to the jury, and the court committed error when it excluded the evidence as to the dealings of the plaintiff with the defendant Long, in regard to the delivery of possession by him to Barden, for the purpose of selling the land and exercising a general control over it, as if he were the absolute owner.

There was some evidence, too, of a settlement, or adjustment, between the parties, Jarman and his attorney agreeing to accept a transfer of the notes and mortgage by Barden to Jarman in full settlement, as appears in the statement of the case.

Barden denied all fraud and testified that he thought he had a good title, and had conveyed such a title to Jarman. It was not good in law, but he may have honestly believed that it was, being a layman and having no technical knowledge of the law or of what was required to constitute a good title. It was not inexcusable ignorance of the law for him to suppose that a transfer of the notes and the mortgage securing them would vest the legal title in him. This would be so in some jurisdictions, where a mortgage is regarded only as a security, and some of the profession may have taken this view prior to the decision in *Williams v. Teachey,* 85 N. C., 402, where this Court held that an assignment of a mortgage, in terms which do not profess to act upon the land,

does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. The question was even hotly contested in that case. We, therefore, must grant a new trial because of this error.

But the appellant contends that the court stated the wrong rule as to the measure of damages when it charged that the jury would allow as damages what the defendant Jarman had paid to Long, who held the equity of redemption. This was not the correct rule. Where a covenantee buys in an outstanding paramount title, the measure of damages in an action for breach of the covenant of seisin in his deed is the reasonable price which he has fairly and necessarily paid for such title, not to exceed the original consideration paid by him. 11 Cyc., p. 1162; *Price v. Deal,* 90 N. C., 291; *Wiggins v. Pender,* 132 N. C., 640; *Bank v. Glenn,* 68 N. C., 35.

The usual recovery for breach of a covenant of seisin, or for one of right to convey, is the purchase money paid by the covenantor, and interest thereon; but where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action in such case is upon the fraud, not upon the covenants of the deed, and the rule of damages for breach of the covenant does not apply. 11 Cyc., 1163.

The court applied the latter rule, where there is fraud, to the breach of an ordinary covenant of seisin, and then directed the jury to assess the damages at the amount paid by Jarman, which, of course, meant that this should be done whether it was or not a reasonable amount which was fairly and honestly paid. If this were the rule a covenantee might pay a very exorbitant price for the encumbrance or paramount title and recover the full amount from his covenantor without regard to the question whether he exercised prudence in making the purchase, or whether he could have acquired the title for a less sum. There is no finding here as to whether the price paid by Jarman to Long for the equity of redemption was excessive or moderate. There is evidence that it is far beyond what should have been paid, but only evidence, the plaintiff Barden having testified that Long had offered to take one hundred dollars for his equity and sign the Jarman deed. There is also other testimony that goes to show a lower value of the equity than eight hundred dollars.

Reverting to the nature of these covenants, as bearing upon the damages for a breach, we find it to be generally settled that a plaintiff cannot recover in an action for a breach of covenant for quiet enjoyment without showing an eviction from the possession under a paramount title, and the measure of damages in such cases is the price paid for the

land, with interest. *Williams v. Beeman,* 13 N. C., 483. But in an action upon a covenant of seisin, all the plaintiff need show is that defendant had no title or no right to convey. *Wilson v. Forbes,* 13 N. C., 30; Rawle Covenants for Title, 66; *Brandt v. Foster,* 5 Iowa, 287. The reason of the distinction is that a covenant for quiet enjoyment is a covenant for possession, and that of seisin is a covenant for title, the word being used as synonymous with *right.*

In an action upon the former covenant, an eviction must be alleged in the complaint or declaration, but in an action on the latter it is only necessary to negative the words of the covenant and to allege that the grantor had no seisin or title to the land. 4 Kent. Com., 479; *Richest v. Snyder,* 9 Wend., 416. And, as a general rule, the measure of damages (purchase money and interest) is the same for a breach of covenant of seisin as for a breach of covenant of quiet enjoyment. *Wilson v. Forbes, supra.* This rule of damages is applicable to those cases where there is an eviction from the whole of the land conveyed, or a want of title to the same, but where there is an eviction from a want of title to only part of the land conveyed, and the plaintiff has been put to the necessity, as in this case, of advancing money to remove an encumbrance, the measure of damages is more difficult to be fixed.

With reference to the last statement, it was said in *Price v. Deal,* 90 N. C., at p. 295: "We think his Honor very properly refused to give the instructions asked for by the defendant, upon the question of damages, but we are also of the opinion that there was misdirection in the instruction which he did give to the jury. It is well settled that a party who purchases land with covenants for seisin or quiet enjoyment may protect himself by buying in the outstanding title. *Faucett v. Woods,* 5 Iowa, 400. When that is done, the measure of damages, according to the best lights we have been able to obtain on the point is, that the damages in such a case would be limited to or measured by, not the value of the land, but by the amount *reasonably* paid for the purpose, provided it did not exceed the purchase money," citing *Faucett v. Woods, supra; Brandt v. Foster,* 5 Iowa, 287; Wood's Mayne on Damages, sec. 255; *Bank v. Glenn, supra.* See, also, 7 Ruling Case Law, p. 1176; *Pate v. Mitchell,* 23 Ark., 590; 11 Cyc., 1165, and the numerous cases in note 47.

The defendant relies on *Lane v. Richardson,* 104 N. C., at p. 650, but the case is distinguishable, for there the Court was speaking of judgments as encumbrances, and not of a defect in the title to the fee. The amount of a judgment, mortgage or other lien is easily ascertained, and the amount being a certain one it necessarily fixes the measure of the recovery.

The covenant of seisin is broken when the deed is delivered, as it implies that the covenantor then had not only the possession, but the

right of possession, and the right of property. This is the primary meaning of seisin; its secondary meaning is possession alone. 5 Modern Am. Law, sec. 593. It is a covenant of title in this State, and not merely one of possession, and is synonymous with the covenant of right to convey (*ibid.*, sec. 595), which also is broken as soon as made.

The plaintiff Barden offered evidence to the effect that the defendant Jarman had undertaken to make an independent investigation of the title before he purchased, and that he did so, and he concludes, therefore, that he acted upon his own investigation, or information therefrom, or from his attorney who made it, and not upon the representations of Barden. He claims that because of this he is discharged from blame, and cites in support of this position 12 R. C. L., sec. 111, p. 357, and also *Shappiro v. Goldberg,* 192 U. S., 292 (48 L. Ed., 419), where it is said by *Justice Day,* at p. 241: "There are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that had the plaintiff declined to believe the representations and investigated for himself he would not have been deceived. *Mead v. Bunn,* 32 N. Y., 275. But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor," citing *Slaughter v. Gerson,* 13 Wall., 379; *So. Dev. Co. v. Silva,* 125 U. S., 247, and other cases decided by the same Court. But whether this principle applies to this case will depend upon the facts regarding the investigation and other relevant matters as they are developed at the trial, and plaintiff can raise the question by a prayer for instructions on the second issue, or perhaps more specifically and in another way, by asking for an issue presenting the precise matter when it is properly pleaded.

Plaintiff Barden also contended that there had been a settlement between him and the defendant Jarman of their differences in regard to the fraud and breach of the covenant, the latter accepting the notes and mortgage, which were duly transferred to him, as a full accord and satisfaction. If there has been a settlement between the parties it may be pleaded and a corresponding issue submitted so that the jury may determine the question under proper instructions.

Before parting with the case, it may be well to recall some general principles recognized by this Court in regard to the liability of a party who practices such a fraud, as is alleged in this case, in the sale and purchase of land. *Walsh v. Hall,* 66 N. C., 233. The maxim of *caveat emptor* is a rule of the common law, applicable to contracts of purchase

of both real and personal property, and is adhered to both in courts of law and courts of equity where there is no fraud in the transaction. Where land has been sold and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's only right of relief, either at law or in equity, for defects or encumbrances depends, in the absence of fraud, solely upon the covenants in the deed which he has received. Rawls Covenants for Title, 459. If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for defects or encumbrances against his vendor, for it was his own folly to accept such a deed when he had it in his power to protect himself by proper covenants. But in cases of positive fraud a different rule applies. The law presumes that men will act honestly in their business transactions, and the maxim of *vigilantibus non dormientibus jura subveniunt* only requires persons to use reasonable diligence to guard against fraud; that is, such diligence as prudent men usually exercise under similar circumstances. In contracts for the sale of land purchasers usually guard themselves against defects of title, quantity, encumbrances and disturbance of possession by proper covenants, and if they do not use these reasonable precautions the law will not afford them a remedy for damages sustained which were the consequences of their own negligence and indiscretion. But the law does not require a prudent man to deal with every one as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled. If representations are made by one party to a trade which may be reasonably relied upon by the other party (and they constitute a material inducement to the contract), and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice. *Walsh v. Hall, supra.* In that case *Justice Dick,* after referring to those principles, says: "No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books, which have established some general princi-

ples which will apply to most cases that may arise. If the falsehood of the misrepresentation is patent and a party accepts and acts upon it with 'his eyes open' he has no right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies and an injured party cannot have redress if he fail to avail himself of the sources of information which he may readily reach unless he has been prevented from making proper inquiry by some artifice or contrivance of the other party. Where the false representation is a mere expression of commendation, or is simply a matter of opinion, the parties stand upon equal footing, and the courts will not interfere to correct errors of judgment. Where a matter which forms a material inducement is peculiarly within the knowledge of one of the parties, and he makes a false representation as to that fact, and the other party, having no reason to suspect fraud, acts upon such statement and suffers damage and loss, he is entitled to relief. Whenever fraud and damage go together the courts will give a remedy to the injured party." Broom Leg. Maxims, 739; Adams Equity, 176; Story's Eq. Jur., ch. 6; *Atwood v. Small,* 6 Ck. and Fin., 232; Chitty on Contracts, 681; Broom's Com. on the Common Law, 347.

For the reasons assigned there must be a new trial of all the issues.

New trial.

W. L. GOODRICH v. ELLIOTT MATTHEWS.

(Filed 19 March, 1919.)

1. Negligence—Evidence—Statutes—Highways—Automobiles—Nonsuit.

Where there is evidence tending to show that one driving an automobile along a country road, sufficiently wide, failed, as required by an existing statute, to turn out upon meeting a pedestrian leading two mules, and ran upon and killed one of the mules, and that the pedestrian had turned out on his side as far as the road permitted: *Held,* his breach of the statute is negligence, entitling the owner of the mule to recover if it was the proximate cause of the injury thereto, and in this case a motion to nonsuit upon the evidence, viewed in the light most favorable to the plaintiff, was properly denied.

2. Evidence— Declarations— Deceased Persons—Accusations Unanswered—Admissions.

Declarations of the deceased owner of a mule that had been killed by defendant, who did not turn out of the road as required by an existing statute, made to the defendant at the time of the occurrence, that "You have run over my mule and you will have to pay for her," is not a communication or transaction with a deceased person, excluded as evidence on the trial, and when the charge was not answered by the defendant it is competent as an implied admission.

GOODRICH *v.* MATTHEWS.

APPEAL by defendant from *Calvert, J.*, at the March Term, 1918, of SAMPSON.

This is an action to recover damages for the killing of a mule belonging to the intestate of the plaintiff which the plaintiff alleges was killed by the negligence of the defendant in driving an automobile.

At the time of the injury complained of the plaintiff was walking along a public road leading two mules and going in a westerly direction, and the defendant was driving an automobile along the road going in an easterly direction and met the intestate of the plaintiff.

There was a motion for judgment of nonsuit at the conclusion of the evidence, which was overruled and the defendant excepted.

A witness for the plaintiff named Cain went to the place where the mule was injured a few minutes after the injury and he was permitted to testify that the owner of the mule said to the defendant "You have run over my mule and you will have to pay for her," and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

No counsel for plaintiff.

E. L. Gavin, Fowler & Crumpler, and W. H. Fisher for defendant.

ALLEN, J. The statute in force at the time of the injury complained of (ch. 107 Laws 1913) required the defendant to turn to the right when he met the plaintiff's intestate on the road, and if he failed to do so he was guilty of a breach of a statutory duty, which is negligence; and if this was the cause of the injury to the mule it is actionable and renders the defendant liable to answer in damages. *Ledbetter v. English,* 166 N. C., 125; *McNeill v. R. R.,* 167 N. C., 396; *Dunn v. R. R.,* 174 N. C., 259.

Does the evidence tend to prove these facts? The road was twenty-one feet wide. E. M. Bullard, a witness for the plaintiff, testified: "The mules, judging from their tracks, were as far to the right as they could get. I noticed defendant's car tracks were in the wheel ruts. I know his car tracks as they had non-skid tires and could tell from that that the defendant kept in the ruts and did not turn to his right. To the right, going west, it was seven feet and 2 inches from the run to the edge of the ditch. I am satisfied Matthews did not turn to his right."

Upon a motion for judgment of nonsuit we must assume that this evidence is true; and if so, it shows that the mules were as close to the ditch on their side as they could go, and that the defendant, having a space of seven or eight feet to his right, instead of going as far from the mules as he reasonably could, did not turn to the right at all, but con-

tinued in the rut ordinarily used by travelers, and that he was therefore negligent in that he failed to obey the statute, and it was for the jury to say, under the circumstances, whether this failure on his part to do as the law required was the proximate cause of the injury. The jury might reasonably conclude that if the defendant had turned two or three feet, which he could have done easily, that the mules would not have been injured, and that the real proximate cause of the injury was because he did not do so.

The evidence of the defendant tends to prove that he was as far to the right as he could reasonably go, and that the injury was not caused by his negligence, but because as he drove opposite the mules one of them backed into the car and was injured; but we cannot base our ruling on this contradictory evidence, as it is the province of the jury alone to pass on the credibility of the witnesses and to determine the weight of evidence, and we must presume that the contentions of the defendant were fairly submitted to the jury, as there is no exception to the charge and it has not been sent up as a part of the record.

We are therefore of opinion that the motion for judgment of nonsuit was properly overruled.

The exception to the evidence does not come within the ruling of *Bumgardner v. R. R.*, 132 N. C., 440, in which the declaration of a deceased party, who was injured, made after the event and detailing the cause of the injury, was excluded because it was a narrative of a past event, as the evidence admitted in this case was a declaration made to the defendant himself, and was in the nature of a charge that the defendant was responsible for the injury, and therefore negligent, to which the defendant made no reply.

It was admissible upon the same ground that a charge of crime or misconduct made to a party and not replied to is dealt with as an implied admission.

No error.

B. LANIER v. THE JOHN L. ROPER LUMBER COMPANY ET ALS.

(Filed 19 March, 1919.)

1. Actions—Misjoinder—Deeds and Conveyances.

A cause of action against a grantee of lands to set aside the deeds under which he claims and to recover damages for cutting timber on the lands is improperly joined with a cause of action against his grantor to repudiate the latter's deed and recover the purchase price of the lands, the two causes being inconsistent and may not be prosecuted at the same time.

2. Same—Lands—Title—Damages—Equity—Following Purchase Price.

A. conveyed the lands in controversy to B., who conveyed it to C.: *Held*, the plaintiff could not maintain in the same action the position that the deed from A. was fraudulent, and recover the purchase price, and at the same time follow that paid by B. into the hands of A. and hold C. liable in damages for cutting the timber upon the lands, the liability of C. necessarily being based upon the ground that B. acquired the title and had conveyed it to him, for this would permit the plaintiff to claim the purchase money of the land, and also the land and timber.

3. Pleadings—Fraud—Treaty—Consideration.

In an action to set aside a deed for fraud, alleging that there was more land within the description than was intended to have been conveyed, and that the grantee knew of the plaintiff's unregistered deed conveying a part of this land when he bought; that the plaintiff was then in possession and the defendant had the lands surveyed and included the plaintiff's land in his deed, and that the defendant induced his grantor to sign by deceit: *Held*, the allegations were only sufficient for fraud in the treaty or consideration and not in the *factum*, and not sufficient to render the deed voidable, allegations being necessary in the latter instance that the grantor could not read, or was prevented from reading his deed before signing, or that the deed was read incorrectly, or that he did not sign the paper he intended to sign.

4. Deeds and Conveyances—Registration—Statutes—Possession.

A deed to lands registered under the Connor Act, Revisal, sec. 980, conveys title as against an unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession, the provision of the said act as to such possession being restricted to deeds executed prior to 1 December, 1885.

5. Same—Fraud—Notice.

Where there is fraud in the treaty or consideration for a deed to lands, which is afterwards conveyed, the grantee, a purchaser for value in the subsequently executed but prior registered deed, acquires the title to the lands, though with actual notice of the deed the former deed being good until set aside.

6. Same—Purchaser for Value.

The purchaser of land by deed registered prior to a prior executed conveyance of lands, without notice of fraud in the consideration or treaty of the former deed, when nothing appears upon the face of the conveyance to put him upon notice of the fraud, and there is no allegation of any notice there, may convey title to another by deed, and the title is good under this last conveyance though the grantee therein may have had actual notice of the fraud.

7. Pleadings—Allegations—Fraud—Deceit.

Where the statement of facts alleged in the complaint in an action to set aside a deed on the grounds of fraud are insufficient to constitute it, the bare allegation that the grantor therein was induced to sign the conveyance by deceit is insufficient.

8. Limitation of Actions—Deeds and Conveyances—Minors—Fraud—Notice.

Where an action is brought to set aside a deed to lands made by a minor more than three years after he has attained his majority, and it appears that the conveyance had been registered many years theretofore, the plea that the action was brought within three years after notice of the fraud is unavailing to stop the running of the statute of limitations.

APPEAL by plaintiff from *Guion, J.*, at the January Term, 1919, of DUPLIN.

This is an action against the Roper Lumber Company to recover damages for cutting certain timber on the land described in the complaint, and against the administrator and heirs of Jefferson Lanier to recover the purchase price of the same.

In 1898 John T. Batts, who was then the owner of the land, executed a deed purporting to convey the same to the plaintiff, who was then under twenty-one years of age. This deed was not registered until 5 February, 1904. On 27 November, 1902, the said Batts sold this land and other lands to Jefferson Lanier and executed a deed to the said Lanier purporting to convey the same, which deed was registered on 27 December, 1902, prior to the registration of the deed to the plaintiff.

On 6 April, 1906, the said Jefferson Lanier sold the timber on said lands to the Blades Lumber Company for $12,000, and executed his deed conveying the same, which was registered 11 April, 1906, and thereafter the Blades Lumber Company sold and conveyed said timber to the defendant, the Roper Lumber Company.

The plaintiff became twenty-one years of age on 29 February, 1910, and this action was commenced 27 October, 1916.

The plaintiff claims that the land conveyed to him in 1898 was embraced in the deed to Jefferson Lanier in 1902 by fraud, and that therefore he is entitled to recover damages of the Roper Lumber Company for cutting the timber; and if this is not so, that he should recover of the administrator and heirs of Jefferson Lanier the purchase money paid by the Blades Lumber Company.

The defendants deny fraud and plead the ten and three years statutes of limitations, to which the plaintiff replies that he discovered the facts constituting the fraud within three years before this action was commenced. The plaintiff knew on 5 February, 1904, that the land he claims and which is described in the complaint was included in the deed to Jefferson Lanier.

It was admitted that the Blades Lumber Company paid Jefferson Lanier $12,000 for the timber conveyed in its deed, and there is no allegation in the complaint that the Blades Lumber Company had notice of any fraud or irregularity or that he knew of the execution of the deed to the plaintiff by Batts.

The allegations in the complaint as to the Roper Lumber Company are that it knew the value of the timber lands of Jefferson Lanier, and did not pay near their value; that it knew of the existence of the deed to the plaintiff at the time of its purchase, and that Jefferson Lanier had bought for much less than the real value, and that the plaintiff was in possession of the land at the time of the purchase.

It is also alleged that at the time of the cutting of the timber in 1916 the Roper Lumber Company had notice of the pendency of an action by the plaintiff against the heirs of Jefferson Lanier to set aside the deed executed to him by Batts in so far as it interfered with the deed executed to the plaintiff in 1898, which action resulted in a judgment for the plaintiff.

The allegations of fraud against the administrator and heirs of Jefferson Lanier are that Lanier bought from Batts for much less than the true value; that Lanier knew of the deed to the plaintiff when he bought; that his contract with Batts was for the purchase of the lands owned by Batts and was not intended to cover the lands conveyed to the plaintiff in 1898, and that Lanier had the land surveyed and included in the deed all of said land.

It is also alleged that Batts was an ignorant man and unskilled in business, and that he was induced to sign the deed by the deceit of Lanier, but it is not alleged that Batts could not read or that any act or representation of Lanier induced the execution of the deed which he signed.

Upon the admissions made by the parties and upon the pleadings his Honor rendered judgment in favor of the defendants, holding that the Roper Lumber Company was the owner of the timber, and therefore not liable in damages, and that the cause of action against the administrator and heirs of Jefferson Lanier was barred by the statute of limitations, and the plaintiff excepted and appealed.

Gavin & Wallace and George R. Ward for plaintiff.
L. I. Moore and L. A. Bailey for Roper Lumber Company.
Stevens & Beasley for defendants.

ALLEN, J. The two causes of action alleged in the complaint—one against the Roper Lumber Company to set aside the deeds under which it claims and recover damages for cutting the timber on the land, and the other against the administrator and heirs of Jefferson Lanier to recover the purchase money of the land—are inconsistent and cannot be prosecuted at the same time, as one repudiates the deed executed to the Blades Lumber Company and the other affirms it; but as there is no objection made on the ground of a misjoinder, we will consider the

causes of action separately, although we might dispose of the appeal as to the Lumber Company by the admission of the plaintiff appearing in the judgment that "in this action he is undertaking to follow the fund received by Jefferson Lanier from said Blades Lumber Company for said timber, to recover his proportion thereof from the administrator and heirs at law of the said Jefferson Lanier, defendants herein, upon the grounds set out in his complaint," which he cannot do except upon the ground that the Blades Lumber Company acquired title to the land which it passed to the Roper Lumber Company. He cannot claim the purchase money of the land and also the land and timber. If, however, there was one action against the lumber company alone to recover damages for cutting the timber, would the plaintiff be entitled to recover? The answer to the question depends on who had the title to the timber at the time it was cut, and this requires some investigation into the allegations of fraud.

Assuming these allegations to be sufficient, they consist in an allegation that Lanier knew of the deed to the plaintiff when he bought; that the plaintiff was then in possession of the land; that Lanier had the land surveyed and included the plaintiff's land in his deed, and that he induced Batts to sign the deed by deceit.

There is no allegation that Batts could not read or that anything was said or done to prevent him from reading the deed before signing, or that the deed was read to him incorrectly, or that he did not sign the paper he intended to sign, and if fraud is alleged it falls within the class of fraud in the treaty or consideration which renders the instrument voidable, and not fraud in the *factum.*

"An instance of fraud in the *factum* is when the grantor intends to execute a certain deed and another is surreptitiously substituted in the place of it. See *Gant v. Hunsucker* and *Nichols v. Holmes, ubi supra.* Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read. 2 Black Com., 304; *Manser's case,* 2 Coke's Rep., 3. These authorities show that the party was fraudulently made to sign, seal and deliver a different instrument from that which he intended, so that it could not be said to be his deed. Several of the cases in our Reports, referred to above, furnish examples of what is meant by fraud in the consideration of the deed, or in the false representation of some matter or thing collateral to it. In all of them it will be seen that the party knowingly executed the very instrument which he intended, but is induced to do so by means of some fraud in the treaty or some fraudulent representation of pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a

court of equity may give relief against it." *McArthur v. Johnson,* 61 N. C., 319, approved in *Medlin v. Buford,* 115 N. C., 269; *Griffin v. Lumber Co.,* 140 N. C., 519.

If so, and there was fraud, the deed from Batts to Lanier was valid until set aside and conveyed the title under the Connor Act, because it was registered before the deed to the plaintiff (*Mintz v. Russ,* 161 N. C., 538), and this is true although Lanier had notice of the plaintiff's deed, as "No notice to purchaser, however full and formal, will supply the place of registration" (*Quinnerly v. Quinnerly,* 114 N. C., 145, approved in *Tremaine v. Williams,* 144 N. C., 116), and although the plaintiff was in possession of the land, the protection given under the proviso to Rev., sec. 980 (Connor Act) to those in possession under an unregistered deed or against those having notice of the deed, being restricted to cases where the deeds were executed prior to 1 December, 1885. *Collins v. Davis,* 132 N. C., 109. See *Wood v. Lewey,* 153 N. C., 402, and cases cited for a discussion of these principles.

Lanier then, having obtained the title, conveyed the timber to the Blades Lumber Company for value, and there being nothing on the face of the Lanier deed to put the lumber company on notice, and no allegation that it had notice of any fraud, it was a purchase for value without notice, and its title was indefeasible, and when it subsequently conveyed to the Roper Lumber Company the latter company acquired the title of its vendor, although it might have had notice of fraud, and having title to the timber there can be no recovery against it.

"This principle, that a purchaser with notice from one without notice is protected by his vendor's want of notice, is a familiar one and does not seem to be seriously questioned by counsel. *Bassett v. Norsworthy,* 2 White & T. Lead. Cas. Eq., 31, notes; 1 Bigelow Frauds, 402; *Taylor v. Kelly,* 3 Jones Eq., 240; *Wallace v. Cohen,* 111 N. C., 103." *Arrington v. Arrington,* 114 N. C., 166. See 39 Cyc., 1650.

We have thus far considered the appeal in the most favorable light for the plaintiff, but there are really no sufficient allegations of fraud, of which the Roper Company is said to have had notice, and the allegations against Lanier are defective. It was not fraudulent in Lanier to have the land surveyed or to buy with knowledge that the plaintiff held an unregistered deed for a part of the land conveyed to him, or when the plaintiff was in possession, and the allegation that Batts was induced to sign the deed by deceit, without stating the facts, is insufficient as "It is a fundamental rule of pleading that when a plaintiff intends to charge fraud he must do so clearly and directly, by either setting forth facts which in law constitute fraud or by charging that conduct not fraudulent in law is rendered so in fact by the corrupt or dishonest intent with which it is done." *Merriman v. Paving Co.,* 142 N. C., 552.

The cause of action against the administrator and heirs of Jefferson Lanier is barred by the statute of limitations, as it appears that the plaintiff knew his land was embraced in the deed to Lanier in 1904 and the deed to the Blades Lumber Company was on record in 1906, and he attained his majority in 1910, more than three years before this action was commenced. *Sanderlin v. Cross,* 172 N. C., 243.

Affirmed.

MRS. J. A. ROYAL ET ALS. v. L. N. DODD, P. F. POPE, AND W. H. PARRISH, TRADING AS POPE & PARRISH, BEN PARRISH AND J. D. POPE (CONSOLIDATED CASES.)

(Filed 19 March, 1919.)

1. **Negligence—Evidence—Fires—Damages—Deeds and Conveyances.**

A., the owner of lands, conveyed the standing timber thereon to B., who conveyed it to C., and the latter contracted with D. to cut or manufacture the same on the premises, and while so doing D. set fire to the lands of A. and adjoining owners, who brought their action against B., C., and D. for the resultant damages: *Held,* as between the parties, it was not required that the deed from B. should have been registered before the fire occurred, and though registered during the trial it was competent as evidence of a registered instrument, and if established passed the title to the timber and relieved B. from liability in the action.

2. **Contracts—Partnerships—Evidence.**

A contract to cut or manufacture lumber between A., the owner of the timber, and B., that the latter should cut the timber at a certain price per thousand, stack the product separately at the mill, convenient for handling, etc., the former to take shingles as manufactured, and thereon advance money for the expenses of manufacture, with settlement each month for the previous month, the owner to have the cull grade of shingles, with equal division of the tar after expenses paid, does not create a partnership between the parties, so as to make the owner of the timber liable to third persons for damages caused to their lands by fire negligently set out by B. while performing his agreement.

3. **Contracts—Independent Contractor—Negligence—Liability of Principal—Principal and Agent.**

An owner of trees standing upon lands may not relieve himself from liability to the owner of the lands and adjoining owners, under the doctrine of independent contractor, for damages by fire set out by his contractor in cutting or manufacturing the timber thereon with a stationary engine having a defective smokestack or spark arrester, and throwing sparks upon combustible matter surrounding it, showing negligent construction of the engine and in the manner of operating it.

4. **Appeal and Error—Objections and Exceptions—Instructions—Evidence.**

While ordinarily a mistake of the trial judge in endeavoring to rehearse the testimony, or give the evidence of a witness, or the admission of the

parties, should be called to his attention at the time to afford him timely opportunity to correct it, or it will not be reviewed on appeal, a misstatement that there is no evidence as to a material and controlling question in controversy does not fall within the rule, and will be held for reversible error.

5. Negligence—Fires—Stationary Engines—Evidence—Prima Facie Case.

Where there is evidence tending to show that soon after defendant commenced cutting or manufacturing timber on the plaintiff's land with a stationary steam engine equipped with a ten-foot smokestack, fire was set out upon inflammable surroundings and communicated to plaintiff's lands to his damage, a *prima facie* case of negligence is made out against the defendant, affording evidence that the engine was not equipped with a proper spark arrester.

6. Instructions— Expression of Opinion— Evidence — Fires — Negligence— Stationary Engines—Defects.

Where there is evidence that the plaintiff's lands were set fire to and damaged by the actionable negligence of the defendant in operating a stationary steam engine thereon not properly equipped with a spark arrester, it is error to the plaintiff's prejudice for the trial judge, in reference to plaintiff's contention to the contrary, to state to the jury that he recollected no evidence as to the spark arrester, and his further remark that they could consider any other defects about the machinery, signified that there was no evidence to support the plaintiff's contention as to the spark arrester, and is reversible error.

THESE were four several actions against the same defendants consolidated without objection, so far as appears, and tried before *Allen, J.*, and a jury, at August Term, 1918, of SAMPSON.

The actions were by several adjoining proprietors of land to recover damages caused to their lands by fire wrongfully started, as they allege, by defendants or their agents in operating a steam sawmill on the tract of one of the plaintiffs, J. C. Jones, and under a contract at the time between L. N. Dodd, owner and operator of the mill, and defendant J. D. Pope, the owner of the timber.

On denial of liability and issues submitted the jury rendered the following verdict:

1. Are the respective plaintiffs the owners of the lands set out in their respective complaints? Answer: "Yes."

2. Did defendants negligently set fire and burn the lands of the plaintiffs, as alleged, and if so, which defendants? Answer: "No."

Judgment on the verdict for defendants, and plaintiffs having excepted appealed.

I. C. Wright for plaintiff.
Butler & Herring for defendant.

HOKE, J. On the hearing it was made to appear that the defendants P. F. Pope and W. H. Parrish, a partnership trading as Pope & Parrish,

owned the timber, with the right to cut and remove same, on the lands of J. C. Jones, one of plaintiffs, sometimes designated as the Smith, or Jim Smith, place, and in November, 1915, they sold and conveyed the said timber and all their rights and appurtenances in reference thereto to their codefendant J. D. Pope, who continued to own same to the time of trial.

The deed, executed in November, 1915, and duly proved and filed with the register during the trial week, was allowed in evidence by his Honor, and plaintiff excepted. That on 27 January, 1916, the defendant J. D. Pope, then owner of the timber, contracted with L. N. Dodd, who owned and operated a steam sawmill, to cut the timber on the said tract of land, the agreement being in terms as follows: "This indenture, made this the 27th day of January, 1916, by and between L. N. Dodd and J. D. Pope, of Harnett County. L. N. Dodd agrees to cut all of the long-leaf timber on the Smith tract of land for $1.50 per thousand and stack each grade separately at mill, convenient for hauling, said timber to be cut clean as he comes to it, down to the ten-inch stumpage. J. D. Pope agrees on his part to take said shingles at the mill and advance enough every two weeks to meet the expenses of manufacturing said shingles and at the end of each month to settle in full for all cut the previous month. It is also agreed between the two parties that L. N. Dodd shall have all the cull grade of shingles, and that the tar is to be divided after all the expenses are paid, equally."

That pursuant to the agreement said Dodd, on 14 March, 1916, having duly placed his mill and engine, commenced to cut the timber into shingles, and a few hours thereafter the fire caught near the mill, burned over the lands of J. C. Jones, where the mill was situated, and the lands of the other plaintiffs, adjoining proprietors, doing substantial and extended damage to all of said tracts.

There was testimony on the part of plaintiffs tending to show that the mill had a smokestack, defective in structure, and that it threw sparks and live coals to a degree that was a menace, and there was pine straw, wiregrass and leaves lying around the mill which had not been cleaned away and where the fire caught, and that the man in charge had been warned by one of plaintiffs not to fire his engine till he cleaned up the straw, leaves and litter around the mill, and that the owner (Dodd) was heard to say after the fire that "the place where he missed it was not in raking off around the mill." There was evidence on the part of defendant in contradiction to that of plaintiff and to the effect, also, that the damage done to the land was not near so extensive as plaintiffs claimed, and that some of the land was not injured at all. Further, that, before contracting with him, J. D. Pope had made inquiry about L. N. Dodd and had been informed that he was a capable and reliable sawmill man.

On these facts, relevant and sufficiently full for a proper apprehension of the questions presented, we concur in his Honor's view that in no aspect of the evidence is a recovery permissible against the partnership of Pope & Parrish, they having conveyed the timber several months before by deed absolute in terms and retaining no interest whatever either in the timber or its manufacture. For the purpose presented, the deed, properly established, was sufficient to pass the title without registration, and the deed having been duly proved and filed for registration with the proper officer we see no reason why, on the facts of this record and as between the parties, the deed should not be received in evidence as a registered instrument. *Smith v. Lumber Co.,* 144 N. C., 47.

We approve also his Honor's ruling that, under the contract presented, there was no partnership created between L. N. Dodd and J. D. Pope in reference to the manufacture of this timber within any definition of partnership recognized by our decisions. *Gorham v. Cotton,* 174 N. C., 727, and authorities cited. The instrument shows that, so far as the shingles were concerned, the mill man was engaged in sawing the timber into shingles for J. D. Pope, the owner, at so much per thousand.

It was further objected by plaintiff that his Honor left it to the jury to determine whether, under the contract between them and the attendant facts, the conditions were so menacing as to deprive defendant J. D. Pope of any defenses which might arise from the fact that L. N. Dodd was at the time an independent contractor. If this relationship be conceded, the exception is hardly presented on the record, for the jury have, in their verdict, declared that neither Dodd nor Pope is liable, but as it will no doubt come up on a second trial we deem it well to make some further reference to the matter.

In *Thomas v. Lumber Co.,* 153 N. C., 352, it was held that a company operating a steam railroad for logging purposes is liable in damages for fires caused by its locomotives by reason of its foul right of way; so dangerous that it might reasonably have been anticipated that injury would thereby occur to adjacent owners, and the principle of independent contractor will not avail the employer in such instances; and again, the operation of a defectively equipped engine or of a good engine not carefully managed, or managed by an unskillful engineer, is such source of danger to the adjacent landowners from fire that an employer cannot relieve himself of the consequent damage under a contract with an independent contractor.

This decision has been cited and approved by us in *Strickland v. Lumber Co.,* 171 N. C., 755, and many other cases, and in his learned and well-considered opinion *Associate Justice Manning,* speaking further to fires caused by a defective engine, said: "We will now consider the view based upon a finding that the fire was caused by a spark emitted by a

defectively equipped engine, but not communicated from the right of way. Would the defendant be liable? If the defendant itself had been at the time operating the engine its liability is governed by the third rule formulated in *Williams v. R. R.*, 140 N. C., 623, as follows: '3. If fire escapes from a defective engine or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable.' The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that those precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another, though he be employed as an 'independent contractor' to perform it."

In *Covington, etc., Bridge Co. v. Steinbrock,* 64 Ohio St., 215, the principle is thus stated: "The weight of reason and authority is to the effect that where a party is under duty to the public or a third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another (citing numerous authorities). The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law the principle is the same as if required by statute. *Cockburn, C. J.,* in *Bower v. Peate, supra.* It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract that raises the duty and which the employer cannot shift from himself to another so as to avoid liability should injury result to another from negligence in doing the work. It cannot be denied that the operation of a defectively equipped engine, or the operation of a good engine not carefully managed or managed by an unskillful engineer, is a source of great danger to property adjacent to the road on which such an engine is operated. Such danger raises the duty which the employer cannot shift from himself to another."

It will be noted that the engine referred to in *Thomas v. Lumber Co.* was a locomotive on a privately owned logging road, and while the principle is probably more insistent on an engine of that character, owing in part to its extended range of action and the greater variety of threatening conditions that are likely to arise, we are well assured that it should be applied also to a case like the present where one owning the timber on another's land contracts with the owner of a steam sawmill to cut the timber with an engine of this kind, always requiring a heavy draft for its successful use; in this instance, having a smokestack not over ten feet high and operated under conditions importing serious menace unless

proper precautions were taken. Helpful cases in illustration of the general principle will be found in *Davis v. Summerfield,* 133 N. C., 325; *Jacobs v. Fuller & Hutsonpiller,* 67 Ohio St., 70, reported in 65 L. R. A., with a full and learned note on the subject; *Thompson v. Lowell, etc., Ry.,* 170 Mass., 577; *Dillon v. Hunt,* 105 Mo., 154; *Bower v. Peate,* 1 L. R., Q. Bench Div., 1873-76, 321; *Hardaker v. Idle Dis. Council,* L. R., Q. B. D., 1896, 335; *Penny v. Welbedon, etc., District,* L. R., Q. B. D., 1899, 72; and *Aman v. Lumber Co.,* 160 N. C., 369, and *Lawton v. Giles,* 90 N. C., 375, are well-considered decisions in our own Court giving support to the position that, in reference to the principle and its proper application, there should be no distinction between locomotive and stationary engines generating and operated by steam, and more peremptorily so when they are defective and used or likely to be used under conditions, as stated, importing menace of substantial injury.

As heretofore stated, the jury having negatived liability on the part of Dodd or J. D. Pope, the results of the trial should not be disturbed by reason of this exception, but we are of opinion that the plaintiff is entitled to have the issues submitted to another jury by reason of another objection to a portion of his Honor's charge, in terms as follows:

"Now the negligence in this case relied upon, as I understand it, is by allowing grass and combustible matter to be near and around the engine that was being used for cutting shingles, and the plaintiffs also contend that there is evidence tending to show that there were defects about the machinery. There were defects about it which caused the sparks to be emitted that set out the fire. (They allege that there was no spark arrester on the mill, but there is no evidence one way or another about that as I recollect it.")

To that part of the charge is parentheses, plaintiffs in apt time excepted.

("As to other evidence about defects in the machinery, I believe there was some evidence of a short smokestack, as contended for by the plaintiffs, and there may be some other evidence which I do not now recall, and if there is you will consider all of the evidence and say whether or not the defendants, or any of them, were negligent with reference to the defective machinery or in permitting any combustible matter to remain there with reference to the fire. And if you find that this combustible matter was allowed to remain there, and that was the cause of the fire, you will answer the issue 'Yes.'")

To the above charge in parentheses, plaintiffs in apt time excepted.

It is well understood with us, both by general rule and precedent, that when a judge presiding at the trial of a cause is endeavoring to rehearse the testimony or to give the evidence of a witness or the admissions of the parties and makes a mistake about it, unless called to his attention

at the time, this may not be made the subject of a valid exception on appeal. *S. v. Lance,* 149 N. C., 551. But taking this portion of the charge and the exceptions noted thereto as a whole, the statement "that there was no evidence one way or another as to the absence of a spark arrester," being as it is in direct answer to an opposing position evidently taken and urged by the counsel for plaintiff and followed immediately by the instruction "that as to other defects about the machinery" the jury would consider the facts and say whether the machinery was defective, could by correct interpretation only have the significance, and be so understood, that the position taken by plaintiff had no evidence to support it. The court evidently had the testimony relevant to the question well in mind and gave to the jury a clear charge making full reference to it, and his ruling, therefore, in direct denial of plaintiff's position was one on the full and legal effect of the testimony and presents a question of law or legal inference properly reviewable on appeal.

This being, to our mind, the true concept of the record, it has been held in numerous cases that when a fire causing damage of this kind is shown to have been started by a spark or sparker from a defendant's engine, locomotive or stationary, a *prima facie* case is made that calls for satisfactory explanation and requiring that the cause be submitted to the jury on the issue of defendant's negligence. *Boney v. R. R.,* 175 N. C., 355; *Simmons v. Roper Lumber Co.,* 174 N. C., 221; *McRainey v. R. R.,* 168 N. C., 570; *Williams v. R. R.,* 140 N. C., 623. And a perusal of many of the cases on the subject will disclose that this rule of proof bears with more directness on the absence or presence of a spark arrester or its defective condition. That is its more usual and natural significance. *Hardy v. Lumber Co.,* 160 N. C., 113; *Williams v. R. R.,* 140 N. C., 623; *Lawton v. Giles,* 90 N. C., 375; *Aycock v. R. R.,* 89 N. C., 321; *Anderson v. Steamboat Co.,* 64 N. C., 399; *Ellis v. R. R.,* 24 N. C., 138.

Not only were there facts in evidence tending to show that the fire originated from defendant's engine, breaking out within a few hours after defendant Dodd started the operation of his engine, and calling for an application of the principle approved in these and many other cases of like kind, but, speaking directly to the defendant's engine and its structure and condition, Raeford Smith, a witness for plaintiff, testified, among other things, and without objection noted, as follows: "I live near the Jones land; knew the mill. On 14 March, 1916, I was dipping turpentine about half a mile from the mill; heard the whistle, saw the smoke, and ran rapidly to the mill. The fire was burning from the mill with the wind, and eight or ten feet from the mill was burning back towards the boiler against the wind. The boiler had just been fired up that day. The mill had a short smokestack, about ten feet high, and

would throw out live sparks and hot coals of fire, for I was there loading some shingle blocks a few days after the fire and if you were not careful it would set your clothes on fire. The pine straw, wiregrass and leaves were lying around the mill on the ground and had not been raked up or burned off."

On this and other apposite testimony, and under the principles of the authorities cited, there was error in the ruling that there was no evidence as to the absence of a spark arrester, and we are of opinion that a general new trial should be ordered.

New trial.

L. L. BALCUM AND WIFE v. J. D. JOHNSON.

(Filed 19 March, 1919.)

1. **Negligence—Fires—Faulty Locomotives—Defects—Evidence.**

In an action to recover damages for the faulty construction of the defendant's locomotive, operated over its tramroad, in setting out fire to the plaintiff's lands, evidence is competent that the defendant's engine threw out sparks and live coals while passing the witness one week before the occurrence, which set out fires, it appearing that the defendant had only one engine, and were it otherwise the evidence should be received when it is shown by the defendant's evidence that the engine was in the same condition on both occasions.

2. **Negligence—Intervening Acts—Damages—Independent Cause—Liability.**

In order for the act of an intelligent intervening agent to break the sequence of events and protect the author of a primary negligence from liability, it must be an independent, superseding cause and one that the author of the primary negligence had no reasonable ground to anticipate, and must be in itself negligent or at least culpable.

3. **Same—Fires—Conflagrations—Back Fires—Causal Connection.**

Where in an action to recover damages of the defendant caused by fire set out by the negligent construction of its locomotive, which dropped live sparks and coals as it passed along upon the defendant's tramroad, there is evidence tending to show that it caused a conflagration importing menace to the principal and adjacent property, endeavor to prevent its spread by back firing is a method approved and frequently resorted to, wherein the conduct of participants is not to be considered or judged with the critical scrutiny that may obtain in more deliberate circumstances; and where there is evidence that one of the participants started a back fire, in a reasonable effort to extinguish the fires, an instruction by the court to the jury that the plaintiff should recover if they accordingly found the facts to be, is a proper one, as the intervening act would not break the causal connection with the defendant's original wrong, the same being neither independent, improbable or culpable.

4. Negligence— Fires— Parties— Remainderman— Life Tenant— Restricted Damages—Trials—Appeal and Error.

The remainderman after a life estate in lands may sue to recover damages to his interest in lands without joinder of the life tenants; and it appearing in this case, on appeal, interpreting the verdict in the light of the language of the issue, the charge of the court, and the exclusion of evidence tending only to show injury to the life estate, that the damages were confined to those of a permanent nature and solely affecting the remainderman, the objection that a recovery had been permitted of the entire damages, without having made the life tenant a party, is untenable.

ACTION tried before *Allen, J.*, and a jury, at September Term, 1918, of SAMPSON.

Plaintiffs, alleging ownership of a designated tract of land, instituted the action to recover damages of defendant for wrongfully setting out fire and burning over the ground by means of a defective engine operated by defendant and his employees over his tramroad, etc.

There was denial of plaintiff's ownership by defendant and of any and all liability in the matter. There was evidence offered by plaintiffs of ownership of land, subject to a life estate therein of one J. A. Balcum, the life tenant not being a party, and also evidence in support of the wrong and damage alleged against defendant. On the part of defendant, there was evidence tending to show that he was in no default by reason of the fire complained of, including testimony to the effect that the fire that caused the damage was in fact and in truth put out by one Tom Wright, who had no relationship with defendant and his work, and for whose conduct defendant was in no way responsible. Evidence in reply by plaintiff that the fire complained of and causing the injury was not started by Tom Wright, and that any fire put out by him was in the reasonable effort to check the spread of the fire started by defendant, and which, under conditions presented, was a neighborhood menace.

On issues submitted, the jury rendered the following verdict:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: "Yes, except as to the life estate of J. A. Balcum."

2. Was the land burned over by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

3. If so, what damages were done to said land and premises? Answer: "$300."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning errors.

George A. Smith and Fowler & Crumpler for plaintiffs.
Butler & Herring and H. E. Faison for defendant.

HOKE, J. Defendant noted an exception to the evidence of two witnesses for plaintiff, Martin Hairr and wife, to the effect that one week

before the fire in question the engine operated by defendant over his tramroad, in passing the witness, threw out sparks and live coals from which fire caught. In this connection it was also proved that defendant owned and operated only the one engine over his road, and under our decisions applicable the evidence is competent on the issue. *Whitehurst v. Lumber Co.*, 146 N. C., 588; *Knott v. R. R.*, 142 N. C., 238. In addition it appeared from the evidence of Andrew Robinson, defendant's engineer and a witness in his behalf, that the engine in question was in the same condition on the day of the fire that it had been for six months previous to the fire, and continued to be for six months thereafter. This in any event would render the evidence receivable on the issue. *Blevins v. Cotton Mills*, 150 N. C., 493.

It was further insisted that his Honor erroneously modified certain prayers for instruction by defendant in reference to the conduct of one Tom Wright, who was engaged with others in the endeavor to extinguish or check the spread of the fire, the prayers more directly involved being as follows:

(*a*) "The defendant contends that the fire originated off his right of way and some distance from it, and that he was in no way responsible for this fire, but that from whatever cause originated this fire was held under control and was not permitted to go across the sand-clay road and was not communicated to the plaintiff's land, and that the fire which burned the lands on the east side of the sand-clay road was set out by a third party, viz., one Tom Wright, and this is the fire that eventually burned the plaintiff's land. If this is true, and the jury should so find by the greater weight of the evidence, then the defendant is not liable. Or if you shall find by the greater weight of the evidence that there was another fire set out by Tom Wright on the east side of the sand-clay road, as contended for by the defendant, and you are then in doubt as to whether the original fire or the fire set out by the third party, Tom Wright, burned the plaintiff's land, in that event the defendant is not liable, and the plaintiff could not recover."

(*b*) "If the jury shall find from the evidence that the fire originated between the defendant's railroad track and the county sand-clay road, which runs parallel with the railroad track and several hundred yards east therefrom, and that while those assembled endeavoring to control the fire and while it was a considerable distance from the sand-clay road, which road was about thirty feet wide and free from combustible matter, one Tom Wright, a third party, instead of back firing along the sand-clay road on the west side of the road and next to the fire, strew fire on the opposite side of the road, being the eastern side of the road, with the wind blowing in an easterly direction, this would be an act of negligence for which the defendant would not be liable."

His Honor, both in his general charge and in direct response, told the jury that the positions embodied in those instructions would prevail in their consideration of the case unless the act of Tom Wright referred to was a reasonable act and precaution to prevent the spread of the fire wrongfully started by defendant. It is the well-recognized doctrine that in order for the act of an intelligent intervening agent to break the sequence of events and protect the author of a primary negligence from liability such act must be an independent, superseding cause, one that the author of the primary negligence had no reasonable ground to anticipate, and usually the act must be in itself negligent, or at least culpable. In Barrows on Negligence, the position is stated and commented on as follows: "Where an independent, efficient, wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former, and not the latter, is deemed the proximate cause of the injury. An efficient, intervening cause is a new proximate cause, which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the chain of causation remote. It is immaterial how many new elements or forces have been introduced; if the original cause remains active, the liability for its result is not shifted. Thus where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away, but for the intervening act he would not have run away and the injury would not have occurred, yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded or obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening, responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible if damage results solely from the intervention." The same principle is satisfactorily treated in Sherman and Redford on Negligence, sec. 31 *et seq.,* and has been very generally approved and applied in the decisions here and elsewhere. *Ward v. R. R.,* 161 N. C., 179; *Hardy v. Hines Lumber Co.,* 160 N. C., 113; *Harvel v. Lumber Co.,* 154 N. C., 254; *Harton v. Telephone Co.,* 146 N. C., 429; *Harton v. Telephone Co.,* 141 N. C., 455; *Ins. Co. v. Boon,* 95 U. S., 117; *R. R. v. Kellogg,* 94 U. S., 469; *Lane v. Atlantic Works,* 111 Mass., 136.

In *Harton v. Telephone Co.,* 141 N. C., 450, the general principle apposite is stated as follows: "The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition. The test by which

to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."

In *Hardy v. Lumber Co., Walker, J.,* delivering the opinion, quotes from *R. R. v. Kellog,* 94 U. S., at p. 475, as follows: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury."

In *Lane v. Atlantic Works, Colt, J.,* delivering the opinion, states the principle: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the conduct charged, but it will not be considered too remote if, according to the usual experience of mankind, the result should have been apprehended."

It is well understood that when a fire of this kind is started, and under conditions importing serious menace to the principal and adjacent property, it is the custom and assuredly the right of the neighbors to lend a hand and do what reasonable prudence and judgment require to prevent its spread, and that back firing is one of the methods approved and frequently resorted to. It is also recognized that in the presence of an emergency like this the conduct of participants is not to be considered or judged with the critical scrutiny that may obtain in more deliberate circumstance. *McKay v. Ry.,* 160 N. C., 260, and authorities cited. In the present case there was much testimony tending to show that the back firing on the part of Wright was done in the reasonable effort to extinguish the fire wrongfully started by defendant, and with such facts in evidence, and under the principles stated, the intervening act of Wright would not break the causal connection with the original wrong of the defendant, the same being neither independent, improbable nor culpable.

Again, it is objected that a proper consideration of the record and verdict will disclose that plaintiffs, the owners in remainder, subject to the life estate of J. A. Balcum, have recovered for the entire injury done to the property when the life tenant has not been made a party and is in no way concluded by the judgment, but in our opinion this objection must also be disallowed. It is the accepted position here and elsewhere that the owners of property in remainder or reversion after a life estate may recover for a trespass which causes permanent damage to the same and to the extent that it wrongfully affects or impairs the value of their estate or interest, and this without the presence of the life tenant in the

suit. *Cherry v. Canal Co.*, 140 N. C., 422; *Gwaltney v. Timber Co.*, 115 N. C., 579; *Jordan v. Barwood*, 42 W. Va., 312; *Shortle v. Terre Haute, etc., Ry.*, 131 Ind., 3218.

It is further recognized and approved in several of our more recent decisions that a verdict should be "interpreted and allowed significance by a proper reference to the testimony and the charge of the court." *Weldon v. Ry.*, at the present term; *Jones v. R. R.*, 176 N. C., 260; *Grove v. Baker*, 174 N. C., 745; *Reynolds v. Express Co.*, 172 N. C., 487.

Considering the record in view of these principles, it very clearly appears from the language of the issue, the charge of the court and his Honor's rulings in the exclusion of evidence, where it only tended to show injury to the life tenant, that the damages assessed in response to the third issue have been restricted to the injuries that were permanent in their nature and to the extent that they affected the interest and estate of the remaindermen, who are both parties of record.

On careful consideration, we find no reversible error, and the judgment on the verdict is affirmed.

No error.

POCOMOKE GUANO COMPANY ET ALS. v. D. F. COLWELL, ADMR., ET ALS.

(Filed 19 March, 1919.)

1. Husband and Wife—Principal and Agent—Wife's Separate Lands—Husband as Agent—Presumptions.

A husband cultivating a farm, the separate estate of his wife, without contract of lease merely acts as the agent of the wife therein, the presumption being that his services were gratuitously given as a contribution to the support of the family, and he has no interest in the crops that his creditors can follow and subject to the payment of his debts.

2. Same—Liens.

Where the husband is merely acting as the agent of his wife in cultivating her farms he may not, as such agent, give a valid lien upon the crops upon his wife's land for any purpose.

3. Constitutional Law— Husband and Wife— Principal and Agent— Wife's Separate Lands—Landlord and Tenant—Statutes.

The wife, under our Constitution, is vested with the right to the custody and control of the entire crops growing on her own lands, raised thereon by her husband as her agent, subject to the rights of her tenants to their share therein under the terms of any contract. Revisal, sec. 1993.

4. Husband and Wife—Principal and Agent—Implied Authority.

Where the husband and wife are living together, and he is acting as her agent in farming her lands, he has implied authority to incur indebtedness

in her behalf for the fertilizer used thereon in making the crop, with her knowledge and without her dissent. *Thompson v. Coats*, 174 N. C., 193, cited and distinguished.

5. Pleadings— Principal and Agent— Husband and Wife— Wife's Separate Lands—Relief.

Where the husband has acted as the plaintiff's agent for the sale of fertilizer, and also as the agent of his wife in cultivating her lands, an action against the wife to subject the crop to the payment of the husband's debt cannot be maintained, but the guano company may recover for the fertilizer used on the wife's crops, with which she is properly chargeable, after deducting such sums of money as the husband may have received on the purchase price of the fertilizer as the agent of the plaintiff, though such relief was not specifically prayed for in the complaint.

6. Debtor and Creditor—Gratuitous Services—Peonage.

The creditor of a husband who has gratuitously acted as the agent of his wife in cultivating crops upon her land may not maintain his action to recover the value of the services thus rendered by him and subject it to the payment of his debt. The matter of "peonage" discussed by CLARK, C. J.

APPEAL by defendant from *Allen, J.*, at September Term, 1918, of SAMPSON.

S. F. Peterson died intestate in November, 1912, leaving a widow and several minor children. During the year 1912 and for some time previously he was engaged in running the farm on his wife's land in said county, part of it with hired labor and the rest by tenants. He also on his own account ran a store, a cotton gin, and acted as agent for the sale of fertilizers. At the time of his death and for some time prior thereto he was insolvent. There was no lease or contract of rental between him and his wife. During 1912 he used guano furnished by himself as agent of plaintiff guano company on the crops on his wife's land, which at his death were practically gathered. He sold twelve bales of the cotton at $655.80 and received the proceeds. The rest of the crops were turned over to the widow by the administrator of the husband.

The referee found that the value of the crops turned over to the widow by the administrator after deducting the rental value of the farm was $1,661.20, and gave judgment against the administrator and the widow for said amount. This action was brought by the plaintiff guano company against the administrator and his surety and also against the widow to recover the value of said crops to be applied to the general indebtedness of the husband for the guano sold by him as agent and for other indebtedness of the husband.

On exception to the referee's report the court reversed the ruling of the referee and held that the defendants were not indebted to the plaintiffs for the value of the crop turned over to the widow, and rendered judgment against the plaintiffs, who appealed.

Tillett & Guthrie, Stevens & Beasley, and McIntyre, Lawrence & Proctor for plaintiffs.

Butler & Herring for S. F. Peterson.

CLARK, C. J. It is found as a fact by the referee and approved by the judge that there was no contract of renting between the husband and wife. The husband was, therefore, as a matter of law and of fact, merely the agent of his wife in carrying on her farm. *Wells v. Batts,* 112 N. C., 283; *Branch v. Ward,* 114 N. C., 149. Whether the farm was rented to tenants or worked with hired labor, the husband was entitled to no share for his services, the presumption being, in the absence of a contract, that he was doing this gratuitously and in order to contribute to the support of a family. He had no interest in the crop which his creditors could subject to the payment of their debts. The husband did not give any lien upon the crop and had no right to do so. *Rawlings v. Neal,* 122 N. C., 173; *Bray v. Carter,* 115 N. C., 16. The plaintiffs have no right to follow the fund which was the purpose of this action.

Under the Constitution the wife holds her property free from any control of her husband (*Manning v. Manning,* 79 N. C., 293) and was vested with the right to the custody and control of the entire crop, subject only to the right of the tenants to their share therein. Revisal, 1993. But while the plaintiffs cannot recover against her for any indebtedness of the husband, whatever amount of guano was bought by him as agent for his wife in making the crops on said land (other than the fertilizers furnished by him for the tenants, as to which no assent of the wife is shown or presumed) would be a liability against the wife, not by reason of her receipt of the crops, but by reason of his implied authority to incur indebtedness for advances in making the crop on that part of the land worked for her directly, if it was furnished with the wife's knowledge and without dissent. *Thompson v. Coats,* 174 N. C., 193, does not apply, for in that case she and her husband were living apart and there was nothing which implied an agency of the husband to act for her. But the Court there said that the supplies furnished the tenants through her husband were not presumed to be by her authority, there being no direct benefit to her.

It is true this action is brought to subject the entire crop (after deducting the rental), and the plaintiffs are not asking judgment against the widow on the ground of his agency, but she is a party to this action, and the plaintiff guano company is entitled to recover any judgment which the facts alleged and proven would warrant, though not set out in the prayer for relief. But on the other hand, the husband was the agent of the plaintiff guano company in selling the fertilizers, and as

there went into his hands the proceeds of twelve bales of cotton (which is found to be $655.80), the guano company cannot recover of the widow, the owner of the land, unless the amount of the guano furnished for the crop worked for her direct, and not by her tenants, exceeded that amount.

When the case goes back if it is suggested that there was an excess of such indebtedness above $655.80, the amount may be ascertained and the judgment may be rendered against the widow for that amount. Judgment should be rendered against the plaintiffs for the costs up to that time, in any event, and for the cost of this appeal.

It has been suggested that the creditor is entitled to recover for the value of the husband's services while acting as agent for his wife. When a man has earned wages they can be garnisheed as his property if no personal property exemption is claimed, but no creditor has a right to the personal services of the debtor or, what is the same thing, to collect payment of the value thereof from one to whom he renders services without charge and thus make a contract which the debtor and the employer did not make. Such claim as this is simply an assertion of "peonage," and if it could be enforced the creditor could follow the debtor around wherever he might go and compel his services through the medium of an employer. It is too late in the world's history to assert such doctrine. Indeed the counsel for the plaintiff did not assert this proposition. He placed his right to recover upon the assumption that a husband acting as agent in supervising his wife's farm was in law a renter (though it is admitted here as a matter of fact that there was no contract of renting), and hence the wife was entitled only to rent and the husband was entitled to the rest of the crop, which therefore the creditor could follow in the hands of the wife. This proposition is without a scintilla of fact to sustain it and has no analogy in the law.

In *Osborne v. Wilkes,* 108 N. C., 651, the Court held that a married woman could employ her husband as her agent to carry on the manufacturing business, and that his "creditors acquire no interest in the profits because he gives his services without other compensation than an indefinite allowance applied by her permission for the payment of his expenses," citing numerous cases (page 672). On page 673 it is said that creditors "have no lien upon the debtor's skill or attainments, nor can they compel him to exact compensation for managing his wife's property, or collect from her as on a *quantum meruit* what his services were reasonably worth. 2 Bishop Married Women, secs. 453, 454, 299, 300. She may remunerate him by furnishing him a support. He may, if he choose, serve her without compensation. 2 Bishop, *supra,* sec. 439; *Corning v. Flower,* 24 Iowa, 584. Indeed, a creditor cannot collect from any person compensation for services rendered by his debtor with the understanding that it was gratuitous. 2 Bishop, *supra.*"

The subject is fully discussed, with full citation of authorities, and none to the contrary, in *Mayers v. Kaiser* (Wis.), 21 L. R. A., 623, and with numerous authorities in the notes on pp. 624 to 628. Indeed, it is useless to discuss what amounts to a self-evident proposition unless, reversing the trend of the times, we should revert to the days when a man's labor and the control of his time belonged to his creditors.

Affirmed.

STATE BOARD OF AGRICULTURE v. WHITE OAK BUCKLE DRAINAGE DISTRICT.

(Filed 19 March, 1919.)

1. **Statutes— Interpretation— Repealing Statutes— Drainage District— Department of Agriculture—Moneys Advanced.**

   Section 1, ch. 235, Public Laws of 1915, by repealing sec. 14, ch. 67, Public Laws of 1911, amendatory of ch. 442, Public Laws of 1909, providing among other things, for advancing moneys to the credit of the Department of Agriculture in the State Treasury to a drainage district formed under the acts, for compensation, etc., of the drainage surveyor, and its refund out of the future sale of the bonds to be issued by the drainage district, etc., construed with sec. 2 of ch. 235, Public Laws of 1915, requiring the Attorney-General, at the request of the Department of Agriculture to bring action against the commissioners of any such drainage district, and the bond of the petitioners for the district (sec. 2, ch. 442, Laws of 1909) that has failed to refund the money so advanced cannot be construed, by correct interpretation, to relieve a district formed under the statutes from refunding the money advanced, as provided by said sec. 14, ch. 67, Public Laws of 1911, before the enactment of the Laws of 1915, from the proceeds of the sale of the drainage bonds thereafter issued.

2. **Same—Primary and Secondary Liability.**

   The liability of a drainage district to refund the moneys advanced by the State Treasurer to the credit of the State Board of Agriculture (sec. 14, ch. 67, Public Laws of 1911) for compensation, etc., of the drainage surveyor is primary and is not affected by the fact that the statute provides that suit may also be brought against the bond of the petitioners for the district. Sec. 2, ch. 442, Public Laws of 1909.

3. **Actions—Parties—Statutes—Interpretation—Department of Agriculture—Drainage Districts—Moneys Advanced.**

   The State Department of Agriculture, where out of its funds the State Treasurer has advanced money for the compensation and expenses of the drainage surveyors, etc., under ch. 67, Laws of 1911, may maintain an action against the drainage district and its commissioners according to the method provided by the statute, the acceptance of the money by the drainage district under the law implying the promise to repay it; and the objection that the commissioners of the district had not authorized the transaction is untenable.

4. Actions— Parties— Drainage Districts— Statutes— Refund of Moneys— State Treasurer—Motions—Supreme Court.

In an action against the commissioners of a drainage district by the State Board of Agriculture (brought under ch. 236, Laws of 1909) to recover moneys advanced by the State Treasurer to a drainage district under sec. 14, ch. 67, Laws of 1911, the State Treasurer is a proper, if not a necessary party, and his motion made in the Supreme Court that he be made a party plaintiff is granted, the money sought to be recovered in the action, when paid into the State Treasury, to be held for the benefit of the other plaintiff and to be paid out as directed by the law.

ACTION, tried before *Allen, J.*, at January Term, 1919, of WAKE.

The State Treasurer, on 25 March, 1912, paid out of the funds of the State Board of Agriculture the sum of $1,125.85 for the compensation and expenses of the drainage engineer of the defendant, the White Oak Buckle Drainage District, and his necessary assistants. The payment of this amount and the purpose for which it was paid are admitted. It is admitted further that the bonds issued by the district have been sold, and were sold 1 August, 1916. The district was organized under chapter 442, Public Laws of 1909; the engineer was appointed upon recommendation of the State Geologist, and the compensation of the engineer and his assistants and their expenses were paid out of the funds of the State Board of Agriculture under section 14, chapter 67 of the Public Laws of 1911, which reads as follows: "That the State Treasurer shall pay the compensation and expenses of the drainage engineer and his necessary assistants as provided in section 2 of chapter 442 of the Public Laws of 1909, according to an itemized statement approved by the clerk of the court to whom the petition for a drainage district was made and the State Geologist, upon warrant of the State Auditor, out of any money in the State Treasury to the credit of the Department of Agriculture: *Provided,* that said sum or sums shall be refunded to the State Treasurer to the credit of the Department of Agriculture by the petitioners for the drainage district if the drainage district is not established: *Provided further,* that if the drainage district is established said sum or sums shall be refunded to the State Treasurer to the credit of the Department of Agriculture out of the first moneys received from the sale of the bonds of said drainage district: *Provided,* that the total amount loaned by the State Treasury out of the funds to the credit of the Department of Agriculture for the purpose set forth in this section shall never exceed $15,000 at any one time: *Provided further,* that not more than $2,000 shall be advanced to any one district; and *Provided further,* that before any advancement is made for the purposes herein expressed the bond of the petitioners required by section 2 of said chapter shall be first approved by the Attorney-General."

It was contended on the argument that the plaintiff could not recover

(1) because section 14, chapter 67, Public Laws of 1911, was repealed by section 1, chapter 235, Public Laws of 1915; (2) because the money was not paid on the request of the commissioners of the drainage district, and has proved to be of no real practical benefit to the defendant.

The court was of the opinion, upon the facts, and so held, that the plaintiff was entitled to recover the amount claimed ($1,125.85), with interest from March, 1912, and rendered judgment accordingly. Defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for plaintiff.

C. D. Weeks and J. G. Mills for defendant.

WALKER, J., after stating the case: While section 14, chapter 67, Public Laws of 1911, was repealed by section 1, chapter 235, Laws of 1915, the repealing act was not passed until after the money had been paid and the relation of debtor and creditor existed. Section 14 expressly provided for the refunding or repayment of the amount so paid, whether the district was finally established or not; if established, the amount should be repaid out of the proceeds of the sale of the bonds issued by the district.

The contention of the defendant is that the repeal of the section by chapter 235, Laws of 1915, canceled the obligation and destroyed the right of the plaintiff to enforce payment. That such was not the intention of the Legislature is clear from the words of section 2, chapter 235, Laws of 1915, as follows: "That upon request of the Department of Agriculture, the Attorney-General shall bring in the Superior Court of Wake County an action against the drainage commissioners of any drainage district that has failed, or may hereafter fail, to refund any money advanced by the State Treasurer under the provisions of section 14, chapter 67, of the Public Laws of 1911, the said action to be brought both against the board of drainage commissioners and the bond of the petitioners for the district required by section 2 of chapter 442 of the Public Laws of 1909."

The effect of the act of 1915 was to relieve the State Board of Agriculture of the burden of advancing money, which was imposed by the act of 1911; but clearly not to destroy the obligation of the debt theretofore contracted. *Blair v. Cookley,* 136 N. C., 405; *Kearney v. Vann,* 154 N. C., 311; *McLeod v. Board,* 148 N. C., 77; *Johnson v. Carson,* 161 N. C., 371; *Manly v. Abernathy,* 167 N. C., 220; *Nance v. So. R. Co.,* 149 N. C., 366; *Clements v. State,* 76 N. C., 199; *Woodley v. Bond,* 66 N. C., 396; *Caldwell v. Donoghey* (Ark.), 45 L. R. A. (N. S.), 721, and note.

Its operation is prospective in this respect, and was manifestly intended to be. This appears plainly from section 2 of the act of 1915, chapter 235, which directs the Attorney-General of the State to bring an action in Wake Superior Court against the drainage commissioners and the bondsmen, for the reason that if it was intended to cancel the indebtedness such a requirement would not have been made. It would be inconsistent with the defendant's construction of the act of 1915, that it destroyed the debt, if the Attorney-General is required to sue upon it at the request of the Department of Agriculture. How could he recover on a debt which had been forgiven and released to the defendants? A plaintiff cannot recover on a debt when there is no debt.

It is thus apparent that although section 14 of the act of 1911, ch. 67, which directed the payment of the money, was repealed, the Legislature preserved in section 2 of chapter 235 of the act of 1915, the right to sue for money already advanced under said act, and of course kept the debt alive for that purpose. The money paid by the Treasurer was paid under the provisions of the act of 1911 and before its repeal by the act of 1915. As the bonds of the district were not sold until August, 1916, the district having been established before the money was paid, it is doubtful if suit could have been instituted before August, 1916, the date of the sale of the bonds. The fact that the bond of the petitioners is equally liable to the plaintiff does not affect the primary liability of the drainage district and its commissioners. It was their duty, in any event, to have paid the advancement made by the plaintiff out of the bond money.

The defendants further contend that the plaintiffs cannot sue because they did not authorize the expense. The answer to this is, they organized the district under the act of 1909 as amended by the act of 1911. The act of 1909 provided for the appointment of the drainage engineer upon the recommendation of the State Geologist. This was done. The surveys and estimates and plans were made by him and his assistants, and the district established based upon these surveys and estimates. The district received the benefit of the expense; the statute directed these expenses as well as the compensation of the engineer and his assistants to be paid by the State Treasurer out of the funds of the plaintiff. The acceptance of the money advanced under the law involved the promise to repay, unless it was a mere gift or an appropriation. That it was such cannot be and is not claimed. The act under which it was paid expressly provided for its repayment by the district, and it was a liability also secured by the bond of those filing the petition for the creation of the district. Having received the money, the defendant cannot repudiate the obligation imposed by the statute to pay it back. If there was no practical benefit derived it was not the plaintiff's fault.

We have referred to the question of actual benefit, although there is no finding of fact and no assignment of error in regard to it, the single error alleged being that the court did not give proper force and effect to the repealing law.

We have reached our conclusion in accordance, as we think, with the principle which is stated in the defendants' brief, as to the interpretation of statutes, that "The law requires, in the interpretation of a statute, that we should give it that meaning which is clearly expressed; and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature." *S. v. Johnson,* 170 N. C., 687, 691; *McLeod v. Comrs.,* 148 N. C., 85; *Fortune v. Comrs.,* 140 N. C., 322; *Abernathy v. Comrs.,* 169 N. C., 631; *S. v. Earnhardt,* 170 N. C., 725; *Peoples Bank v. Loven,* 172 N. C., 666.

The defendants' contention as to the meaning of the act of 1915 would require us to ignore section 2 of chapter 235, Laws of 1915, and confine our construction of the chapter to section 1, repealing section 14 of the Acts of 1911, chapter 67. This would violate the settled rule, as we are required to examine the entire statute to ascertain its meaning and to give force and effect to every part of it, reconciling, when reasonably possible, any seeming conflicts by comparing its sections and provisions with each other.

"It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation." Black's Interpretation of Laws (1896), p. 60, sec. 32.

And again: "Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act." *Ibid.; Bank v. Loven, supra.*

The Legislature undoubtedly intended to change its policy, but as clearly did it manifest the purpose to preserve existing debts and save to the plaintiffs the remedy for their enforcement, and this was a just and righteous purpose.

B. R. Lacy, Treasurer of the State, comes into this Court and asks to have himself made a party, as one of the plaintiffs, he agreeing to abide

by the proceedings and judgment. The request is granted, the Court being of the opinion that he is a proper if not a necessary party, and that his becoming a party will inure to the benefit and protection of the defendant, he being the receiving and disbursing officer of the fund recovered in this action under the statute in such cases made and provided. When paid into the State Treasury, the money will be held for the benefit of the other plaintiff and paid out as directed by law.

There is no error in the record.

Affirmed.

JAMES W. COX, JR., ET ALS. v. KINSTON CAROLINA RAILROAD AND LUMBER COMPANY ET ALS.

(Filed 28 March, 1919.)

1. Appeal and Error—Rules of Court—Docketing Case—Dismissal.

A motion for a *certiorari* to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed under Rule 17 for the failure of the appellant to have his case docketed seven days before entering upon the call of the docket by the Supreme Court of the district to which it belongs, as required by Rule 5.

2. Appeal and Error—Settlement of Case—Time Extended—Courts—Agreement of Council.

The requirement as to the time of settling cases on appeal is statutory, without authority of the courts to extend it, and though the parties may extend it by agreement, this practice is discouraged.

APPEAL from *Allen, J.*, at December Term, 1918, of LENOIR.

By consent, thirty days was given to serve case on appeal and twenty days thereafter to serve counter-case. The appeal was required by the rules to be docketed here on or before Tuesday, 25 February, at 10 a. m., or the appellant was entitled to docket and dismiss under Rule 17, unless the case was docketed or a *certiorari* on good ground was applied for before the motion to dismiss was made.

J. S. Manning for plaintiffs.

Cowper, Whitaker & Hamme for defendants.

CLARK, C. J. Rule 5 of this Court (174 N. C., 828) provides:

"RULE 5. *When Heard.*—The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument

in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript."

The appellee docketed and moved to dismiss at 1:30 p. m. on Saturday, 1 March, and was entitled to have the motion allowed. The appellant thereafter at 6 p. m. on the same day moved to docket and asked for a *certiorari* for the case on appeal upon the ground that the judge had not settled the case on appeal.

Without going into the controversy as to whose fault it was that the case was not settled in time, it is clear that the appellant was in laches in not applying for *certiorari* before the time at which, under the procedure and practice of this Court, the appellee was entitled to docket and dismiss.

As *Judge Merrimon* well observed in *Walker v. Scott,* 102 N. C., 490, the rules of the Court are necessary for the regular and orderly dispatch of business, and not perfunctory, to be observed or not as the parties may choose. If not observed, there would be a great waste of the time of this Court in arguing whether or not the rule ought to be observed in a given case or ought not. It is absolutely necessary that these rules shall be observed, and that a party who neglects to do so shall understand that he must pay the penalty of his neglect.

This Court has always held that the time in which cases shall be settled on appeal being statutory, the court below has no power to extend the statutory time. *Gupton v. Sledge,* 161 N. C., 213, and cases there cited. Though we have recognized the right of the parties by consent to extend the statutory time, it is not a practice to be encouraged and very frequently leads to such controversies as in this case. In this case, however, there was ample time to settle the appeal after the expiration of the extended time.

The appellee having docketed the motion to dismiss under Rule 17 before the appellant filed his application for *certiorari* was within his rights and is entitled to have the appeal dismissed, and the motion for *certiorari* must be denied. The necessity of the Court adhering to its rules has been repeatedly stated. Among other cases, this is discussed in *Calvert v. Carstarphen,* 133 N. C., 25; *Vivian v. Mitchell,* 144 N. C., 477; *Lee v. Baird,* 146 N. C., 363.

We have, however, read the record with care, and find no merits in the appeal, which was probably taken merely for delay. In any event, the appellee is entitled to have his motion to dismiss allowed.

Appeal dismissed.

D. C. GRANTHAM ET ALS. v. EZRA JINNETTE ET ALS.

(Filed 28 March, 1919.)

1. **Wills—Devise— Estates— Contingent Remainders— Heirs— Questions of Law—Extrinsic Evidence—University of North Carolina—Statutes.**

A devise by an illegitimate of all of the real and personal property to his wife, and after her death the property to be sold by the executor and the proceeds to be divided among his "legal heirs" after the payment of certain bequests after the death of the wife: *Held*, the terms of the will are unambiguous and the expression "legal heirs" must, as a matter of law, be given their legal significance without the aid of parol evidence tending to show that the testator regarded the children of his mother's sister as his next of kin, or erroneously thought they would inherit as such. The devise being effective upon the death of the wife, the lands of the testator would go to the University of North Carolina under the statute upon the death of the wife and the failure of heirs of the testator at that time.

2. **Wills— Heirs at Law— Husband and Wife— Statutes— Wife an Heir— Contingent Remainders—Estates.**

Where a testator has devised all of his real and personal property to his wife, the executor to sell the property left by her at her death and divide the proceeds among his "legal heirs," and the wife has taken under the will and has died, and there are no heirs of the testator at that time to take under the terms of the will: *Held*, the widow was not the heir at law of her husband under the common law, and the statute (Revisal, sec. 1556), while making her an heir of his, does so, under Rule 8, where the husband has not devised the property, and when there are no heirs at law of the testator at the time of the wife's death the inheritance will not descend to her heirs at law, nor can they take against the express provisions of the will.

ALLEN, J., dissenting.

APPEAL by defendants from *Daniels, J.*, at November Term, 1918, of WAYNE.

The plaintiffs have brought an action to recover the property in question from the defendants, who are in possession, and the University of the State has intervened and been made a party by order of court.

From a judgment for the plaintiffs the defendants and the intervenor appealed.

Langston, Allen & Taylor, J. L. Barham, Dickinson & Land, J. F. Thomson, W. W. Cole, and D. C. Humphrey for plaintiffs.

W. S. O'B. Robinson, A. C. Davis, Teague & Dees, Leon G. Stevens, and D. H. Bland for defendants.

Bryan & Brogden, Hood & Hood, and Murray Allen for the University of North Carolina, the intervenor.

CLARK, C. J. The case turns upon the construction of the following clauses of the will of Haywood Bizzell:

"Item 3. I give and bequeath to my beloved wife, Elizabeth, for the term of her life, all the balance of my real estate, all personal property of every kind of which I shall die seized or possessed."

"Item 5. After her death, I desire that all property, real and personal, left by her under Item 3 of this will shall be sold publicly or privately, as he (the executor) shall think best, and the proceeds shall be divided among my legal heirs, subject to the following bequests."

The following admissions were made on the trial and entered in the record:

1. That the testator was an illegitimate son, born in 1833; that his mother was never married, and died in 1862, and that the testator was her only child; that the testator married in 1856, but no children were born of said marriage; that he died in December, 1896, leaving his widow and the will in question; that at the time of his death he was seized in fee and possession of the lands in question, which were all acquired by purchase.

The plaintiffs do not claim that they are the heirs at law of the testator, nor that they are entitled to any part of his estate under the statute of descents (*Bettis v. Avery,* 140 N. C., 184), but they contend that they are the persons referred to and intended by the testator in the use of the words "my legal heirs," and that by parol testimony they can show that by the devise of his property, after the life estate given his wife, to "my legal heirs" he intended Mack McCullen and Frank McCullen. Cal (or Mack) McCullen and Frank McCullen were the sons of Ann Bizzell, the sister of the testator's mother, who married a McCullen. Mack McCullen and Frank McCullen are dead and the plaintiffs are his heirs at law. The language on which the plaintiffs rely is the testimony of one Odom, that on one occasion his father said to the testator, "Haywood, what are you going to do with your property?" To which he replied, "Well, I don't know. I have never decided exactly what I will do with it." And when further asked, "Haven't you got no kin people?" to which he said, "Yes, I have got some kin people. Mack McCullen and Frank McCullen are kin to me." Witness said that was about twenty-five years ago and about three or four years before testator died.

R. A. Whitfield, witness for the plaintiff, testified that he heard the testator say that Mack McCullen was the nearest kin he had. John White testified that he had seen the testator a few times; that a year or a year and a half before he died, when he went to pay him some rent, the testator "got to talking with him, and he said he had no children and no kinsfolk, but the McCullens were kin to him and would be his heirs he reckoned.

Davis Wiggins testified that the testator "took dinner with him on one occasion and stated in conversation that his mother was a Bizzell; that Annie McCullen was her sister, and spoke of his mother and Cal's mother being sisters; that he does not remember hearing him speak of any one else."

This evidence, taken to be true, cannot vary the expression in the will that the property, after the life estate given to his wife, should go to his "legal heirs." There is no ambiguity. The devise is to a class—"my legal heirs"—and who they were is a matter of law, even if the testator had erroneously supposed that under the law illegitimates could inherit as heirs; but the evidence and the will show that he did not.

Upon the evidence, the motion for nonsuit as to the plaintiffs should have been granted. This is not the case where there is a latent ambiguity as to the person intended, and evidence is admitted which shows that the testator was in the habit of calling the person by the name set out in the will, though it was not the true name of the person. It often happens that the person is known by a nickname or some other name in common use, and such designation is shown by parol testimony to point out the devisee who was intended; but in all those cases the person was clearly intended and the question is only of identification.

But here the class is clearly and definitely stated in terms that admit of only one construction, "my legal heirs," and admittedly Mack McCullen and Frank McCullen did not come within that designation. Besides, the will was written several years before the death of the testator, when his wife was some forty years old. It was by no means improbable that he might have children by her, or that she might die and he might have children by a second marriage. If the loose words used were sufficient to substitute Mack McCullen and Frank McCullen in lieu of the words "my legal heirs" it would not only contradict the terms of the will, which is unambiguous, but if there had been the subsequent birth of children by his then wife, or by any subsequent wife, they would have been incapable of inheriting as against the two McCullens. This construction is therefore not to be entertained, and it would be useless to cite the numerous cases which are to be found in all the books to the effect that when an unambiguous expression is used in a will, such as "my legal heirs," it cannot be contradicted by verbal statements put in evidence twenty-five years later, or at any other time, showing that the testator recognized as related to him persons who were not his legal heirs, and that he intended that the property should go to them in spite of his devising his estate not to them, but to "his legal heirs." Who are the "heirs" is not a matter for the jury, but a matter of law for the Court. *Bradford v. Erwin,* 34 N. C., 291; *Morrison v. McLaughlin,* 88

N. C., 255; *Patterson v. Wilson,* 101 N. C., 597. Besides, the testimony, if competent, was not sufficient to be presented to the jury.

The defendants, who are in no wise related to the testator, claim as heirs of the wife and insist that she was entitled under Revisal, 1556, which provides, "When any person shall die leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate." This would apply only if there had been no will, or a will not disposing of the entire estate. In such case this property would have gone to the wife and then to the defendants as her heirs. But here the testator disposed of all his property by his will and intended to dispose of it fully, which conclusively appears from the will itself; and this being the case, when there is a default in the "legal heirs" to whom a part of the remainder of the estate is devised, it does not go to the wife, but to those who fill the designation of legal heirs at the time the remainder should fall in.

The testator devised and bequeathed to his "wife, Elizabeth, for the term of her life, all the balance of my real estate, all personal property of any kind of which I shall die seized and possessed." She elected to take under the will and never dissented.

In Item 2 of the will the testator had given to Preston Thornton 106 acres of land described in the will and the balance of the estate to his wife for life.

Item 4 of the will provides: "*After the death* of my said wife, I devise and bequeath to the Oxford Orphan Asylum $1,000, to be collected from the sale of the property, real or personal, *left at my said wife's death.*"

Item 5 provides: "*After her death,* I desire that all property, real and personal, *left by her* under Item 3 of this will shall be sold publicly or privately, as the executor shall think best, and the proceeds thereof shall be *divided among my legal heirs,* subject to the following bequests, to wit:

Item 6. I give to D. A. Bizzell, son of Albert Bizzell, $500 *after my wife's death.*

Item 7. I give to Ann Eliza Cox, daughter of W. E. Cox, $200, to be paid *after my said wife's death.*

Item 8. I give to Selah Church, built by my wife, namely, $200, to be paid *after my wife's death.*

Item 9. I hereby appoint John S. Bizzell executor of this will."

The questions presented are:

(1) As of what time is the class designated by the testator as his "legal heirs" to be ascertained—at the time of his decease or at the decease of his widow?

(2) What was the effect of the widow's failure to dissent? This last

need not be determined, unless we were of opinion that the class was to be ascertained as of the time of the testator's decease.

Although in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described by the testator as his legal heirs, etc., to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator, the fact that the property is to be converted into personalty and distributed as such at the death of the first taker is indicative of an intention that the class shall be ascertained at the termination of the life estate. The fact that at the time of the making of the will the person to whom a particular estate was given will presumably be at the testator's death, the sole member of the class to whom the same property is limited, and the use of terms importing plurality in the membership of the class and requiring a *division* among them, while not conclusive of an intent to postpone the ascertaining of the membership of the class, are other indications of such an intention properly to be taken into consideration.

The fact that the widow seems to have been given by implication power to use so much of the principal as she might see fit for her own benefit tends to negative the supposition that she was intended to take under the ultimate limitation. *Hardy v. Gage,* 66 N. H., 552; *Bisson v. R. R.,* 143 N. Y., 125.

Under this will all the property was given to the wife for life (except the devise to Preston Thornton), and there was no devolution over till *after her death.* At that time, the provision that the property should all be sold and, after the payment of the bequests to the orphan asylum, to D. A. Bizzell, to Eliza Ann Cox, and to Selah Church, and the provision that the remainder should be divided among his "legal heirs" by his executor, show not only that the remainder was not devised to the wife nor intended to go to her heirs, but that it was devised and should go to his "legal heirs" in existence after his wife's death. The devise of the remainder speaks of that date.

There was no defect in the will. The property was fully devised and the wife acquiesced therein. The defect is that at the time the division was to be made there were no "legal heirs." If there had been any legal heirs at that time they would have taken the property, and only those who were his legal heirs after his wife's death could have taken, for the provision is that the property should be sold and divided "among the legal heirs" at that time.

If at the testator's death there had been legal heirs other than his wife, they could not have taken if they had predeceased the wife. His "legal heirs" could be those only who were in existence and entitled to receive the legacy at the time of her death. Those only could share in the *divi-*

sion "among my legal heirs," for they alone could answer to the description.

It may well be that the testator expected that he would leave legal heirs by his then wife, who was forty years of age at the time the will was made, or he may have contemplated the possibility of legal heirs by a future marriage.

In *Bowen v. Hackney,* 136 N. C., 187, the will provided for a division of the property between the children of the testator "at the expiration of the life estate," and it is said in the opinion by *Walker, J.,* that "the division is not to be made until the death of the life tenant, and that is the time fixed by the terms of the will when it shall be definitely and finally determined who shall take."

The language of this will brings it within the principle of the decision in *Bowen v. Hackney,* and it follows that the legal heirs of M. H. Bizzell, the testator, are to be determined as of the time of the death of his wife, the devisee of the life estate.

The language of the will in our case is not only sufficient to bring it within the authority of *Bowen v. Hackney,* but is much stronger than in that case in expressing the intention of the testator to annex the time fixed, *i. e.,* the death of the life tenant, to the substance of the gift as a condition precedent, as well as to the time of enjoyment, which *Mr. Justice Walker* says creates a contingent remainder. Though similar to *Bowen v. Hackney,* it is stronger than that case, because there the will did not provide for a sale of the property by the executor and a division of the proceeds, but provided only for the division of the specific property devised to the wife for life.

The contention of the defendants that the legal heirs of testator must be determined at the time of the testator's death is based upon assumption that this "is a devise to E. for life and after her death to the heirs of devisor," and that the will of M. H. Bizzell devised to his legal heirs a remainder which vested at the time of his death, and that the testator's wife being his sole heir at law at that time, the life estate and the remainder merged in her as a fee-simple estate.

At common law the widow was not her husband's heir. She is made so by statute (Revisal, sec. 1556, Rule 8), but the very statute creating the status limits its application to undevised property of the husband. Section 1556 of the Revisal provides that "When any person should die seized of any inheritance or of any right thereto or entitled to any interest therein *not having devised the same* it shall descend" as set forth in the several rules of descent. This language when considered in connection with Rule 8 cannot have the effect of making the wife the husband's heir where the property is *devised* by the husband to his heirs, and certainly not where the wife is devised a life estate with remainder

to the heirs of the husband. The language of the will in this case precludes any intention on the part of the testator to devise to his wife a life estate and also a fee-simple estate in his property. It directs the sale of the property "left by" his wife and to divide the proceeds among his *legal heirs.*

The property to be sold was not simply all of the property which had been devised to the wife for life, but "all property, real and personal, *left by* her under Item 3 of this will." How could the property be "left by her" if the life estate and the fee merged in the wife at the death of the testator, as contended by appellants?

By Item 4 of the will the testator bequeaths $1,000 to the Oxford Orphan Asylum, to be collected from the sales of property, real or personal, "left at my wife's death," again demonstrating the fact that it was not the intention of the testator to devise to his wife the life estate and the remainder. The testator devised to his "heirs at law" a contingent remainder, and that such heirs should be determined at the time of the death of the wife. This is supported by the decisions of this Court and the courts of other States.

In *Latham v. Lumber Co.,* 139 N. C., 9, it is held that a contingent, and not a vested, remainder was created by the provisions of a will devising a life estate to the testator's daughter, "and after her death the said land and negroes are to go to the children of my said daughter and the children of such as are dead."

"Where a testator devises and bequeaths the whole of his estate, real and personal, to his wife during her natural life, except certain amounts to equalize gifts among his children, and then without any express or implied legacy except as contained in the direction to his executor to convert into personalty and distribute, makes the following dispositive clause, viz.: 'After the death of my wife, I desire that the whole of my property, both real and personal, be sold by my executor, and after expenses are paid to distribute equally to my legal heirs,' the rule that a bequest in the form of a direction to pay or to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the fund or estate, or merely to let in some other interest, does not apply. In such case the direction to the executor to pay or to distribute to the testator's 'legal heirs' confers a contingent interest which does not vest until the period of distribution; and the direction to distribute equally to my legal heirs is equivalent to a direction to make distribution in accordance with the statute providing for descent and distribution." *Barr v. Denny,* 79 Ohio St., 358.

"A devise to the widow for life, and 'at her death' to the testator's 'heirs at law,' creates a contingent remainder, and the estate goes in fee to such persons only as, at the widow's death, answer to the description of 'heirs at law' of the testator." *Forrest v. Porch,* 100 Tenn., 391.

"A testator bequeathed to his wife 'the use of thirty shares in the Oxford Bank, said shares, at her decease, to be equally divided between his heirs,' and died leaving several children. It was *held* that the reversionary interest of any one of the children in these shares was contingent, and consequently not liable to be attached as his property in the hands of the executor." *Rich v. Waters,* 39 Mass., 563.

"Though the heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the termination of the life estate given to the widow. That was the time fixed for the gift to take effect, and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator, would be entitled to share with the heirs of his widow in the distribution of the estate. Within that time the number of his heirs might be diminished by death or increased by birth." *Bissen v. R. R.,* 143 N. Y., 130.

In construing a will containing language very similar to that used by the testator in our case, the Supreme Court of New York says: "The widow received a life estate. There was no gift in terms of remainder. But the will contained a direction to sell the land after the termination of the particular estate and divide the proceeds among the objects of the testator's bounty. The rule is well settled that where there is no gift, but by a direction to pay or divide at a future time, the vesting in the beneficiary will not take place until the time arrives. As futurity is annexed to the substance of the gift, none can take except those designated by the will as qualified to take at the time of the division." *Beyer v. Finnen,* 165 N. Y. Supp., 805.

"Where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent, not vested." *Hirsch v. Gillespie,* 167 N. Y. Supp., 855; *Matter of Crane,* 164 N. Y., 76.

In *Read v. Fogg,* 60 Me., 479, a father, by deed of warranty, conveyed certain land to his daughter "for her use and benefit during her lifetime, and after her decease to her legal heirs, to them and their heirs and assigns forever," and it was held that the deed created a remainder that was contingent until the daughter's death, when it vested in those who were *then* her heirs at law.

The terms of the will indicate plainly (1) that the wife was restricted as devisee to her life estate, and was to receive nothing more; (2) that *after the wife's death* (which was repeated five times in the will) the property was to be sold, and after the payment of the four legacies named the remainder was not to go to the wife; and certainly the testator did not intend that it should go to her heirs, nor was it left undevised. It was devised to those who should be *his* "legal heirs" *after* her death.

There is a specific devise, clearly and unmistakably made, of the remainder after her death to be "divided among my legal heirs," which could not contemplate that the remainder was undevised. There being no legal heirs at that time, our statute directs that it shall go to the University, as the representative of the general public, who take in default of "legal heirs" in such cases.

This would have been the case if the wife had predeceased the husband, and this could not be changed by the fact that she took and enjoyed the unrestricted life estate which he gave her. At her death the property was devised to his legal heirs existing at that time, and there were none other than as designated by the statute in such cases as this—*i. e.*, the University of North Carolina.

The clear and unmistakable intent of the testator was to dispose of all his property after his wife's death, and that such property should go to those who should be after her death his "legal heirs." He had a right to so direct, and having so directed, the property can go to no others than those who fill such description "after her death." There being none, under the provisions of the State Constitution the judgment should direct that after payment of the legacies the residue of the estate shall be paid over to the trustees of the University of North Carolina, the intervenors.

The sale and division of all the property devised to the wife was specifically directed to take place "after her death." She could not possibly then be his heir. This decision is fully supported by *Mr. Justice Hoke* in *Jenkins v. Lambeth,* 172 N. C., 466, 469.

The judgment will be entered accordingly.

Reversed.

ALLEN, J., dissenting: I think I may assert with confidence that this is the first instance on record in which it has been held that property escheated when the owner left a will undertaking to dispose of it, and when if he had died intestate there was one who could take as his heir.

That the owner intended to dispose of his entire estate appears from the will in the record, and that one survived him, his widow, who could take as heir in case of intestacy, is shown by Rule 8 of Descents, which is as follows: "When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate."

We should not, I submit with deference, reach such a conclusion unless forced to do so by imperative legal rules, as it thwarts the will of the testator and is at variance with the spirit of the statute of descent, which, in this instance, names an heir, and with the law of escheats, which substitutes "the University in the place of the public in regard to

all such real property as fell to the State for want of heirs capable to take." *University v. Gilmour,* 3 N. C., 130.

In determining the rights of the parties, I attach no importance to the words in the will "left at my said wife's death" and "left by her," which are emphasized in the opinion of the Court, because in Item 3 the testator gave to his wife for life personal as well as real property; and knowing that she could not dispose of the land, and that much of the personal property would be consumed, the words naturally refer to the personal property left by her.

The controversy depends on the legal effect to be given to the devise to the "legal heirs" of the testator in the fifth item.

When one "has made a will, the presumption is that he thereby intended to dispose of his entire property," and "the instrument must be construed in reference to that presumption" (*McCallum v. McCallum,* 167 N. C., 311), and in this case we not only have the legal presumption, but the will shows unmistakably the purpose to dispose of all his property.

"The intention must be gathered from the will itself, as read, in view of all the facts and surrounding circumstances" (*Wooten v. Hobbs,* 170 N. C., 214) and "The meaning attributed by him (the testator) to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator whose will may be under consideration intended." *Gray v. West,* 93 N. C., 444.

If there is "no defect in the description of either the person or thing on the face of the instrument it becomes necessary to fit the description to the person or thing; in other words, to identify it. Here, as a matter of course, evidence *dehors* is admissible." *Institute v. Norwood,* 45 N. C., 69, approved *McLeod v. Jones,* 159 N. C., 76.

"Words of every kind, technical as well as others, and particularly when used in last wills, are liable to be varied in their meaning to meet the intention of those who use them; when shown in an authentic manner, the word *heir* may mean some other person than him on whom the law casts the inheritance in a real estate." *Croom v. Herring,* 11 N. C., 395.

It is true in the *Croom case* the word "heir" was used in connection with personal property, and there was other language in the will indicating that it was not used in its technical sense, but the case is authority for the position that *heir* "may mean some other person than him on whom the law casts the inheritance in a real estate."

Applying these principles, it appears that there is no defect on the face of the will, as the term "legal heirs" has a known signification; but

when construed technically there is no one to answer the description and it is presumed the testator intended to dispose of his whole estate and had some one in mind who could take, it is necessary to look at the situation of the testator and the surrounding circumstances in order that the persons called "legal heirs" may be identified, and it was for this purpose the parol evidence was admitted, and it shows that the plaintiffs are the children of Frank and Calve McCullen and are the lineal descendants of the sister of the mother of the testator; that the testator spoke of Frank and Calve McCullen as "first cousins," as "kin to me," as "the nearest kin he had," and said "he had no children and no kinsfolk but the McCullens, and that the McCullens was kin to him and would be his heirs he reckon." Webster defines "reckon" "to conclude, as on an enumeration and balancing of chances; hence to think, suppose"; and as so understood at the time the will was made, the testator concluded, thought, or supposed, the McCullens were his legal heirs, and so devised his property to them. He was thinking of some one, and if not of the McCullens, of whom? since he had declared they were not only his nearest kin, but that he had no other kin, and he thought they were his heirs.

The suggestion that the testator may have had in mind the birth of a child by a second marriage, or by his wife then living, has nothing to support it. Wills speak as of the death of the testator (Revisal, sec. 3140), and the possibility of a second marriage died with him, and it is not within the bounds of probability that he had even a remote idea that the wife with whom he had lived thirty-nine years, and who had given birth to no child, would bear him a child and "legal heir" within nine months after his death.

I therefore think that the verdict of the jury finding that the testator meant by the use of the words "my legal heirs," Frank and Calve McCullen, ought to stand and the judgment be affirmed, and the same conclusion would be reached if the property devised is treated as personalty.

But if this is not so, it does not follow that the University takes by escheat; and, on the contrary, if the plaintiffs have no title, it seems to me, clearly the defendants are the owners as devisees of the widow of the testator.

The Court says "There is no ambiguity. The devise is to a class—my legal heirs; and who they were is a matter of law." Granted, for the purpose of the discussion, and the law says "When any person shall die leaving none who can claim as heir to him, his widow shall be deemed as heir to him, and as such shall inherit his estate." In other words, the opinion of the Court, as I understand it, proceeds upon the idea that the testator had no person in mind when he said "my legal heirs," and that he intended those to take who could answer the roll call,

without regard to person; and if so, the widow must be held to have the title as she was the only legal heir under the statute when the will was made, when the testator died, and when she died. *Everett v. Griffin,* 174 N. C., 107, is an instance of the word "heir" in a will being held to include a widow, and in *Freeman v. Knight,* 37 N. C., 75, the same effect was given to "my legal heirs." The first case is also authority for holding that the proceeds of sale should be dealt with as personalty upon the ground of equitable conversion, but I do not think this affects the rights of the parties as the widow would take the same, whether as heir or distributee.

The phrase "after her death" is no stronger than "at the expiration of my wife's interest," and it was held in *Taylor v. Taylor,* 174 N. C., 538, that in a devise to the wife during widowhood "and at the expiration of my wife's interest in land and property, divide it equally among my living children," that the children who were to take must be ascertained as of the death of the testator, and the same rule would give this property to the widow.

The objection is made that this view cannot prevail because a life estate is given to the widow, and that this demonstrates that the testator did not intend for her to have more, but I respectfully submit that this is answered by the Court when it is held that the testator had no one in mind when he wrote "my legal heirs," and that his purpose was to give the remainder to those upon whom the law cast the inheritance, without regard to person; and if this is true, and the widow falls within the class, she must take.

Again, it is urged that the widow cannot take under the Rule of Descent except when the husband dies "not having devised the same," and that the devise to "my legal heirs" prevents the operation of the rule, but the Court has held that the property has not been devised because there was no one to take. If, however, the widow is not within the term "my legal heirs" and cannot take under the will, there is no one who can, no one has ever been in existence who could, and no one can now come into being to answer the description; and if so, the devise in remainder lapsed and was void, and this upon the death of the testator left the life estate in the widow under the will, and the remainder in fee undisposed of, which the widow inherited under the Rule of Descent before referred to.

There is one other position in favor of the widow, which is amply supported by authority, and which was approved in a unanimous opinion of this Court in *Thompson v. Batts,* 168 N. C., 334, and that is that the devise to "my legal heirs" was void as a remainder and left the reversion in fee in the testator at his death, and if so, it passed to the widow under the Rule of Descent.

Ferne says, page 51: "A limitation to the right heirs of the grantor will continue in himself as a reversion in fee. As where a fine was levied to the use of the wife of the couser for life, remainder to the use of B. in tail, remainder to the use of the right heirs of the couser, it was adjudged that the limitation of the use to the right heirs of the couser was void, for that the old use of the fee continued in him as a reversion."

In *Read and Morpeth v. Evington,* Moor K. B., 284, it was ruled that "If a man seized in fee make a feoffment to the use of A. in tail or for life, remainder to the use of his own right heirs, the land upon the death of A. without issue returns to the feoffer as his ancient reversion, and does not rest in his right heir as a remainder by purchase."

Sir Edward Coke says: "If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void and he hath the reversion in him, for the ancestor during his life beareth in his body (in the judgment of law) all his heirs." Co. Litt., 22.

In Hargrave and Butler's notes (1 Am. Ed., from 19 London Ed. of 1853) one of the notes to this section states the following case, being note 3: "Feoffment to the use of feofee for forty years, remainder to B. in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it, for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor." See, also, 2 Wash. Real Property, 692, and *Robinson v. Blankinship,* 92 S. W., 854, 24 A. & E. Enc. L., 398.

Referring to remainders limited to heirs of grantor, *Chief Justice Parson,* in Law Lectures, p. 142, note, says: "A grant to Z. for life, remainder to heirs of grantor, the limitation is not a remainder, but the grantor takes his old reversion." Again, on p. 147, note: "The test by which the applicability of the doctrine may be determined in any particular case is to strike out the *devise to the heir,* and if he would still take the same interest as the will gives him, the devise is void."

"An instance of this sort of remainder is exhibited in a grant to Z. for life, remainder to the heirs of grantor. This limitation, although denominated a remainder in the grant, really is not such. It does not devolve on the heirs of the grantor as purchasers, as it would do if a remainder, but remains in the grantor himself as his old reversion in fee." Minors Institute, Vol. 2, pp. 399-400.

"It is a settled maxim of common law that a person cannot make a conveyance of realty to his own right heirs; and a remainder thus limited is void and will remain in the grantor as his old reversion, and his heirs at his death will take by descent and not by purchase." *Harris v. McLaren,* 30 Miss., 533.

The same principle is recognized in *King v. Scoggin,* 92 N. C., 99,

where the Court says: "It is true, remainders are created by deed or writing, but the estate is sometimes created, so that what is called a remainder is, in effect, only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the grantor (2 Washburn on Real Property, 692; Burton on Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him."

"An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. It is a present vested estate, although to take effect in possession and profit *in futuro.*" 16 Cyc., 661.

"A reversion descends like the old inheritance." *King v. Scoggins,* 92 N. C., 102.

Under this principle, twice approved unanimously by our Court, so much of the estate as the testator attempted to devise to his legal heirs did not pass by the will, but remained in him as a present vested interest, and upon his death descended to his heirs, and at the time of his death his widow was his only heir.

If this is sound it can make no difference that the devise to "my legal heirs" is *after the death* of the wife, because the devise being to the heirs of the testator it can never take effect as a remainder vested or contingent, and operates only as a reversion, which left in the testator at his death the interest attempted to be devised to his heirs, and as "a reversion descends like the old inheritance" it would belong to the widow, who was the only heir at the death of the testator. In other words, it never has been, nor can be, necessary to ascertain the legal heirs of the testator *after the death* of his wife, because the attempt to devise an interest to his heirs after the life estate of his wife is inoperative and has the legal effect of leaving that interest in the testator at his death, and it would descend to him who was then his heir.

It seems that a sale of the property will not be necessary as all of the parties to the record have elected to treat the property involved in this litigation as land. Why, then, is she not entitled to the property in preference to the University? If it be said the testator did not intend for her to have more than a life estate, it is certain he had no intention of giving his estate to the University, and as the University has abandoned the domain of intent and is relying upon technical legal rules, she may do likewise. I have, therefore, come to the conclusion that the plaintiffs are entitled to recover; and if not that, the defendants are the owners of the land, and that the University has no standing in Court.

OSBORN C. NOBLES, SR. v. STEPHEN F. NOBLES ET ALS.

(Filed 28 March, 1919.)

1. Actions—Suits—Cloud on Title—Statutes—Estates—Remainders.

One claiming the fee-simple absolute title to lands under a devise may maintain his action, under the provisions of our statute, to remove, as a cloud upon his title, the claims of others that the devise was only of a life estate with remainder over to themselves.

2. Wills—Devise—Estates—Remainders—Heirs—"Legal Representatives"—Rule in Shelley's Case.

A devise of testator's lands to his son, and then to his "legal representatives," conveys the estate in remainder to the heirs of the first taker as a class "to take in succession from generation to generation," to the same extent and in the same quantity as they would take under our canons of descent; and the words "legal representatives" being synonymous with the word "heirs," the devise comes within the meaning of the word "heirs" used in the Rule in Shelley's case, the remaindermen not taking as by purchase, and the fee-simple absolute title vests in the first taker.

3. Judgments—Estoppel—Tenants in Common—Severance of Possession—Title.

As a general rule, a judgment does not work an estoppel of record as between the parties supposed to represent the same interest unless their rights and interests have been made the subject of inquiry and decision, nor in any event does an adversary judgment constitute an estoppel as to matters beyond the scope of the issues as presented and embraced by the pleadings; and where proceedings in partition of lands contemplates only a severance of possession between tenants in common, and not the question of title, a judgment therein does not estop one of them from maintaining an action to remove, as a cloud upon his fee-simple absolute title, which he claims by devise, the claims of others that the devise was only of a life estate with remainder over to themselves.

ACTION tried before *Allen, J.*, at January Term, 1919, of PITT.

The action was to remove a cloud on the title of plaintiff, claiming to own the land in fee simple under a devise in his mother's will, as follows: "Item 1. I give and devise to my son, Osborne C. Nobles, the home in which I now live, together with all the buildings and one-half of the tract of land on which they are situated, during his lifetime, then to his legal representatives," the other half of the land having been devised, one-fourth each to Stephen F. and John C. Nobles. That in 1910, Stephen F. and John C. Nobles and plaintiff, Osborne C. Nobles, made an attempt to divide same and executed deeds to each other in pursuance of their agreement and on the theory that Osborne C. had a fee-simple interest in the portion of land divided to him.

Question having been raised as to the fee-simple title of O. C. Nobles, with a view of perfecting the division and mutually assuring the title, a proceeding was instituted and partition was made by commissioners

duly appointed by the court, and in which the share of O. C. Nobles was allotted to "him and his legal representatives."

It was contended and claimed by defendants, children of O. C. Nobles, that their father, under the devise, only had a life estate in the property, and that said defendants owned the remainder in fee.

There was judgment for plaintiff, and defendant excepted and appealed.

F. C. Harding for plaintiff.
No counsel for defendant.

HOKE, J. In *Satterwhite v. Gallagher,* 173 N. C., 528, speaking to the proper interpretation and effect of our statutes now controlling in actions of this character, to remove a cloud from the title, the Court said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, or which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all the plaintiff shall pay the costs." And in same volume, *Smith v. Smith,* p. 124, the principles so stated were applied to a case like the present, where the father, claiming to own the land in fee, was allowed to maintain a suit against the children, who asserted that he only had a life estate in the property, with the remainder to his said children.

Coming, then, to the principal question, we concur in his Honor's view that the devise in his mother's will, "to my son, Osborne C. Nobles, the home and buildings and one-half the land, for his lifetime, and then to his legal representatives," confers upon the devisee a fee-simple estate in the property under the rule in Shelley's case. The principles of this notable case have been discussed and applied in several of our later

decisions, and the rule appearing given in Coke's Reports and Preston on Estates is given, respectively, as follows: "That when an ancestor, by any gift of conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase." 1 Coke, 104. And in Preston on Estates: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate of an interest of the same legal or equitable quality to his heirs or the heirs of his body as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

So stated, the rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that when the terms of the instrument by correct interpretation convey the estate in remainder to the heirs of the first taker as a class, "to take in succession from generation to generation" to the same persons as those who would take as inheritors under our canons of descent and in the same quantity, the principle prevails as a rule of property both in deeds and wills and regardless of any particular intent to the contrary otherwise appearing in the instrument. *Crisp v. Biggs,* 176 N. C., 1; *Cohoon v. Upton,* 174 N. C., 88; *Ford v. McBrayer,* 171 N. C., 421; *Robeson v. Moore,* 168 N. C., 389; *Jones v. Wichard,* 163 N. C., 241; *Price v. Griffin,* 150 N. C., 523; *May v. Lewis,* 132 N. C., 115; *Nichols v. Gladden,* 117 N. C., 497.

It will be noted that in both Coke and Preston, *supra,* the words "heirs or heirs of the body" are used in defining the estate in remainder; but in the case of wills and in courts and instruments which permit and recognize other words as their equivalent and as descriptive of all those who will take in succession by reason of their hereditable blood, such words are not essential, and the rule is effective where the equivalent of heirs or heirs of the body are used in defining the estate in remainder.

In the very full discussion of the subject by *My Lord Macnachten* appearing in *Gruten v. Foxwell,* Appeal Cases, L. R., 1897, p. 658, case of a will, after stating the rule as given in Coke's Rep., on pp. 667-669, he proceeds as follows: "Every part of that statement is, I think, deserving of attention from the opening words, which declare the rule to be 'a rule of law,' to the last clause which says 'the heirs can never take by purchase in a case where the rule applies.' It is hardly necessary to observe that any expression which imports the whole succession of hereditable blood has the same effect in bringing the rule into operation as to the word heirs, though perhaps it was not always so."

And again at p. 676: "The authority of *Jesson v. Wright* was restored and its supremacy finally established in *Roddy v. Fitzgerald,* and the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression having like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of successors capable of inheriting."

And in the same case *My Lord Davy* expresses himself as follows: "In my opinion, the rule in Shelley's case (3) is a rule of law, and not a mere rule of construction—*i. e.,* one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue, shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary."

In *Yarnell's appeal,* 70 Pa. St., 335, interpreting a will, it was held, among other things: "If the testator intends his estate to go to the whole line of descent, lineal and collateral, he means heirs. . . .

"The rule in Shelley's case is not a real exception to the rule that the intention of the testator must guide in interpreting a will; it sacrifices a particular to a general interest. . . .

"Heirs or 'heirs of the body' or issue, children, sons, and similar expressions, are words of limitation or purchase, according to the intent of the testator in each particular will."

In the extended and valuable note on several decisions discussing the rule in Shelley's case, among others, *Price v. Griffin,* 150 N. C., 523, which appears in 29 L. R. A. (N. S.), at p. 1014, the author says: "In the statement of the rule in the argument in Shelley's case the words of limitation used are 'heirs and heirs of the body.' To bring the rule into operation, however, it is not necessary always to use such words; equivalent expressions will do when the statement is made that the word heirs must be used. What is meant is that the word heirs or equivalent words are necessary."

In the case of wills the same position is approved by the standard text-books on the subject, uniformly, so far as examined. 3 Jarmon on Wills, p. 116; 2 Underhill on the Law of Wills, p. 890; Powell on Devises, 22 L. Litt., Vol. 2, part 2, p. 435; Tiedeman on Real Property, sec. 434; Burdick on Real Property, pp. 370, 371.

In the citation to Jarmon the author says: "In respect to the limita-

tion to heirs, we have before suggested that it is immaterial whether they are described under that or any other denomination, since it is clear that in any case in which the word issue or son has been construed as a word of limitation and follows a devise to the parent for life, or for any other state of freehold, he becomes tenant in tail by the operation of the rule in Shelley's case. The words in question are used as synonymous with heirs of the body, and consequently the effect is the same as if those words had been actually used, and upon the same principle in the converse case where the words 'heirs of the body' are explained to mean some other class of persons the rule does not apply."

In *Handy v. McKim,* 64 Md., 561, the Court was construing a deed, and the application of the rule was denied on the ground that in that jurisdiction and as to a common-law deed only the word heirs or heirs of the body would suffice to describe all of those who could take by inheritance. And in *Jane v. Wenze,* 65 N. J. Eq., 210, in a bill for specific performance, relief was denied on the ground chiefly that the construction of the particular instrument was attended with so much doubt that defendant would not be compelled to accept the title, but both in this case and the one preceding it seems to have been conceded that at common law and unaffected by statute controlling the question, in case of a will, the word heirs or heirs of the body were not necessarily required for the operation of the rule in Shelley's case, but that equivalent words would suffice. This being the established position, it is very generally held here and elsewhere that in construing a will which makes disposition of real estate to one and his legal representatives, with nothing in the instrument to qualify or restrict their import, the words legal representatives should be considered as the equivalent of heirs, and the quality and quantity of the estate determined in reference to that interpretation. *Little v. Brown,* 126 N. C., 752; *Moore v. Quince,* 109 N. C., 85-90; *Ewing v. Jones,* 130 Md., 247; *Olney v. Lovering,* 167 Mass., 446; 2 Underhill on Wills, p. 852, sec. 638. And a correct deduction from these principles is in full support of his Honor's ruling that, under the will of his mother and by operation of the rule in Shelley's case, the plaintiff becomes the owner of the land in fee simple.

The objection that the plaintiff is estopped from asserting such ownership by reason of the proceedings for partition is without merit. The record of that proceedings is not sent up, but it is very apparent that the partition in question only contemplated a severance of the possession between the tenants and in affirmance of the division that the owners had already made by their deeds. As a general rule, a judgment does not work an estoppel of record as between parties supposed to represent the same interest unless their rights and interests have been made the subject of inquiry and decision, nor in any event does an adversary

judgment constitute an estoppel as to matters beyond the scope of the issues as presented and embraced in the pleadings. *Weston v. Roper Lumber Co.*, 162 N. C., 165; *Holloway v. Durham*, 176 N. C., 551; *Hobgood v. Hobgood*, 169 N. C., 485.

We find no error in the record, and the judgment for plaintiff must be Affirmed.

JONES-ONSLOW LAND COMPANY v. J. S. AND D. F. WOOTEN.

(Filed 28 March, 1919.)

1. **Judgments—Default—Irregular Judgments.**

A judgment by default final taken in a suit to remove a cloud upon the title to the plaintiff's lands after summons has been duly issued and served, complaint filed without answer, etc., after several terms of the court have elapsed at which the cause was triable, is not irregularly entered or contrary to the course and practice of the courts.

2. **Appeal and Error—Judgments Set Aside—Findings—Excusable Neglect—Meritorious Defense.**

In setting aside a final judgment for excusable neglect it must be properly made to appear on appeal that the negligence was excusable, and also that the defendant had a meritorious defense, with findings by the trial judge on both of these matters; and while his findings of fact are conclusive when supported by evidence, the questions of whether they or each of them are sufficient to constitute the required grounds are matters of law and reviewable on appeal.

3. **Judgments Set Aside—Attorney and Client—Laches—Duty of Client.**

A defendant is not relieved of laches for failing to file his answer, or to see that the action is properly looked after, merely because he has employed an attorney for that purpose; and where the action has been duly commenced and complaint filed it is not excusable neglect sufficient to set aside a judgment by default final for want of an answer for him to show that he had employed an attorney to defend him, who was drafted into the army two months after the answer should have been filed and two terms of court had since passed before the judgment complained of had been entered.

4. **Judgments Set Aside—Meritorious Defense—Evidence.**

The defense is not sufficiently meritorious to set aside a judgment final for want of an answer in a suit to remove a cloud upon the title to the plaintiff's land when it appears that both parties claim under grants and mesne conveyances from the State; that the plaintiff's grant was prior to defendant, and that he had also acquired the title of the defendant's grantor prior to the execution and registration of his deed.

5. **State's Land—Grants—Junior Grants—Possession—Color of Title—Statutes.**

LAND CO. *v.* WOOTEN.

Possession of State's land under a junior grant made since 1893 confers no rights upon the grantee or grantees therein, nor does such junior grant constitute color of title. Revisal, sec. 1699.

APPEAL by plaintiff from *Allen, J.*, at December Term, 1918, of ONSLOW.

This is an appeal from an order setting aside a prior judgment by default final obtained by the plaintiff. The facts are found in detail by the judge.

T. D. Warren and A. D. Ward for plaintiff.
Cowper, Whitaker & Hamme for defendants.

CLARK, C. J. This was a motion by J. S. Wooten, one of the defendants, to set aside a judgment by default final rendered at October Term, 1918, on the allegation that the judgment was irregular, and also on the ground of excusable neglect. There was no irregularity in taking the judgment, and upon the facts found the neglect of the defendant was not excusable.

This action was begun by the plaintiff alleging that it was in possession and asking to set aside the claim of the defendant as a cloud upon title. The summons issued in June, 1913, returnable to Onslow. The complaint, duly verified, was filed at April Term, 1918. There was no answer filed at that term and the July Term of the court was not held. At October Term, 1918, no answer having been filed, the plaintiff took judgment by default final. The judge finds that the defendant originally employed T. C. Wooten counsel, residing at Kinston, to defend him; that subsequently he dispensed with the services of said counsel, though it does not appear when, and employed J. Frank Wooten counsel, resident in Jacksonville, to attend to the case; that on 15 August, 1918, said J. Frank Wooten entered the army, but he had not entered an appearance in the action and had filed no answer. It does not appear that the defendant had paid any attention to the cause at all, though the complaint had been on file six months and his counsel two months previously had left the county to enter the army, which must have been a matter well known to him. This was not such conduct as a man of ordinary prudence would have given to his important business matters.

In *Roberts v. Allman,* 106 N. C., 391, it is held: "It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give it that amount of attention which a man or ordinary prudence usually gives to his important business." This case cites many others to same effect and has itself been cited often since. See Anno. Ed. Besides, it is not necessary to discuss the point for there is no finding by the judge that the defendant has a

meritorious defense nor would the facts found have sustained such finding.

Unless the judge finds that there was excusable neglect, and this finding is correct as a matter of law, he is not authorized to set aside the judgment. The facts found by him are conclusive if there is any evidence on which to base such finding of fact. Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal.

But even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense. *Norton v. McLaurin,* 125 N. C., 185, where the subject is fully discussed with full citation of authorities. See, also, cases cited thereto in the Anno. Ed. In the recent case of *Glisson v. Glisson,* 153 N. C., 188, *Brown, J.,* says: "Unless the Court can now see reasonably that defendants had a good defense, or that they could make a good defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside? *Jeffries v. Aaron,* 120 N. C., 169; *Cherry v. Canal Co.,* 140 N. C., 423." This is cited with approval by *Walker, J., Harris v. Bennett,* 160 N. C., 347.

In the still more recent case of *Lumber Co. v. Cottingham,* 173 N. C., 323, *Walker, J.,* after citing and approving the analysis set out in *Norton v. McLaurin, supra,* says: "It would be idle to vacate a judgment if there is no real and substantial defense on the merits. But we need not decide as to this feature of the case, for there must be both excusable neglect and a meritorious defense as the cases cited by us will show."

In *Crumpler v. Hines,* 174 N. C., 284, *Allen, J.,* citing many authorities, says: "One who asks to be relieved from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party."

The judge further finds as facts that the plaintiff's and defendants' chain of title both cover the land in controversy; that defendants' chain of title is a grant, 10 March, 1898, mesne conveyances to T. C. Wooten, who on 17 February, 1911, conveyed to the defendants by deed which was recorded 27 February, 1911. Also that the "plaintiff's claim is under grant issued about 1795, which covers land in controversy; also under tax deeds, and connected with same by unbroken chain of title." And, also, that it acquired the T. C. Wooten title (under which defendants claim) by lien which attached prior to the said Wooten's deed to defendants, by virtue of a regular sale under execution on a judgment against T. C. Wooten docketed in Onslow on 10 February, 1911, eleven

days before the deed from said Wooten to the defendant was registered and seven days before it purports to have been executed.

There is not only no finding, or evidence set out in any affidavit to justify such finding, of any actual possession by defendants or those under whom they claim; but even if they had been in actual possession from the date of the grant it would have been of no avail as the grant was issued after 1893, to wit, 10 March, 1898. Rev., 1699, provides: "Every grant of land made since 6 March, 1893, in pursuance of the statutes regulating entries and grants, shall, if such land or any portion thereof has been heretofore granted by this State, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatsoever; shall confer no rights whatever upon the grantee or grantees therein or those claiming under such grantee or grantees, and shall in no case and under no circumstances constitute any color of title to any person whomsoever." The statute was sustained in *Weaver v. Love,* 146 N. C., 414.

Upon the facts found the defendant has not shown any meritorious defense and the judge has not so found. The judgment below must be Reversed.

J. H. KEARNEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 28 March, 1919.)

1. Railroads—Fires—Negligence—Evidence—Nonsuit—Trials.

In an action to recover damages by fire to the plaintiff's property alleged to have been negligently set out by the defendant railroad company's passing locomotive, there was evidence tending to show that the locomotive passed at 3 p. m., that the fire was discovered the following morning at 2:30; that the first of plaintiff's buildings to burn was near the foul railroad track; and in defendant's behalf, that the plaintiff's boiler-room near the center of the lands was the first to catch, and the fire was attempted to have been put out by the plaintiff's clerk who left it before it was completely extinguished, by which reason it started again and caused the damages complained of: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, including proximate cause, and a motion of nonsuit was properly denied.

2. Pleadings — Contributory Negligence — Negligence —Fires—Railroads—Statutes.

The plea that an employee of the plaintiff had negligently failed to see that he had entirely extinguished a fire started by the locomotive of the defendant railroad company, and that the fire rekindled and caused the plaintiff the damages complained of in his action, is one of contributory negligence required by the statute to be pleaded. Revisal, sec. 483.

3. Negligence—Principal and Agent—Scope of Agency—Instructions—Trials.

Where the plea of contributory negligence of the plaintiff's agent in not completely extinguishing a fire set out by the defendant railroad company is available to the defendant in the action, and there is supporting evidence, a requested instruction that excludes the principle as to whether it was within the scope of the agent's duty, as such, to extinguish the fire, is properly refused.

4. Instructions—Appeal and Error—Objections and Exceptions—Special Requests.

Exception that the charge of the trial judge to the jury was not sufficiently full upon a certain aspect of the case should be to his refusal to give a requested instruction bearing thereon, or it will not be considered on appeal.

APPEAL by defendant from *Stacy, J.*, at February Term, 1918, of FRANKLIN.

This action is to recover damages for property alleged to have been burned by the negligence of the defendant. From a verdict and judgment for $10,000, the defendant appealed.

White & Malone, W. H. Yarborough, and W. M. Person for plaintiff.
Murray Allen and B. T. Holden for defendant.

CLARK, C. J. Owing to the amount involved, this case has required very full consideration of all the exceptions, but it really turned almost entirely upon controverted facts of which the jury were the arbiters. The plaintiff contended that the fire was due to the negligence of the defendant in permitting its right of way to become foul and its engine emitting sparks which set fire to the right of way and thus destroyed his property. The defendant contended that the fire originated in the plaintiff's boiler-room. The train alleged to have set out the fire passed about 3 p. m. and the fire was discovered raging about 2:30 next morning. There was evidence that there was a fire on the defendant's right of way after train passed. There was evidence that this fire was put out by a clerk of the plaintiff, and circumstantial evidence that though he attempted to put it out he failed to do so. There was conflict in the testimony of the witnesses of plaintiff and of defendant as to what was the first building to burn. The plaintiff's witnesses testified that the building nearest the railroad burned first, while defendant's witnesses said the fire originated in plaintiff's boiler-room, which was about the center of the lot. These were matters for the consideration of the jury, and there was sufficient evidence to be submitted to them tending to show that the fire resulted from the negligence of the defendant. It has been uniformly held by us that in passing upon the motion to nonsuit,

the evidence in support of plaintiff's claim must be accepted as true and construed in the light most favorable to him. *Boney v. R. R.*, 175 N. C., 354. There is no need to review the evidence. The motion to nonsuit was properly denied.

The defendant relies strongly upon the lapse of time between the passage of the train at 3 p. m. and the outbreak of the fire in burning the buildings, but this was a matter for the consideration of the jury. In *Hardy v. Lumber Co.*, 160 N. C., 118, there was a lapse of twelve days during which the fire seems to have smouldered. The question of proximate cause in this case was submitted to the jury in accordance with the principles and authorities in that well-considered case.

The other exceptions are settled by *Hardy v. Lumber Co., supra,* and the cases therein cited. We need only to consider at more detail exceptions 18, 31, and 32, that the court refused to charge the jury that "If the jury shall find from the evidence that Emmett Edwards, as an employee of the plaintiff, failed to put out the fire when by the exercise of a prudent man he should have done so, the plaintiff could not recover." There is no averment in the answer to support such a plea which would be an allegation of contributory negligence. Revisal, 483, specifically requires that such plea should have been set up in the answer. See *Hardy v. Lumber Co., supra.* If this defense had been set up in the answer, and if there had been evidence tending to show that it was within the scope of Edwards' duty, still the prayer would have been defective because such defense must be proven by the defendant by the greater weight of the evidence.

Besides, though Edwards was an employee of the plaintiff, there is no allegation and no evidence which tends to show that it was within the scope of his duty to put out fires. He was a clerk or manager of the store. An employer is not responsible for the negligence of his employee outside the scope of his employment. Especially in respect to preventing damages from fire the rule is thus stated, 33 Cyc., 1346, note 56: "An employee of the owner in another business not connected with the property is under no legal obligation to protect it, and his omission to do so is not contributory negligence on the part of the owner."

We do not think that the other exceptions require discussion. The court instructed clearly upon the question of proximate cause, and though the defendant excepts that the charge should have been fuller in that regard, the defendant asked no instructions upon that point. *Hardy v. Lumber Co., supra.*

The charge of the court seems sufficiently clear and full. The defendant was charged in the complaint with negligence in two respects, and the plaintiff put on evidence to sustain both allegations, yet the defendant put on no evidence in denial of either the foul right of way

or of negligence in putting out fire on such right of way. The controversy as submitted to the jury upon the facts was whether fire was set out by the negligence of the defendant and whether the fire thus set out spread to and destroyed the plaintiff's property.

The amount involved justified the very thorough discussion in the argument and briefs here, and the facts were doubtless fully presented to and thoroughly understood by the jury, who have found their verdict in favor of the contentions of the plaintiff.

Upon the questions of law presented to us by the exceptions of the defendant we find

No error.

AMERICAN NATIONAL BANK v. SAVANNAH TRUST COMPANY ET AL.

(Filed 28 March, 1919.)

Banks and Banking—Bills and Notes—Checks—Nonpayment—Notice of Dishonor—Liability.

A bank received on deposit a check of its customer on another bank and sent it to its correspondent bank for collection. The check was not paid by the bank on which it was drawn and the correspondent bank was negligent in not notifying the forwarding bank for more than a month of its nonpayment and in sending it to the payee bank for collection: *Held*, the liability of the correspondent bank to the forwarding bank did not solely depend upon whether the check would have been paid in due course had it been presented, but also, whether the forwarding bank could have protected itself from the maker, or otherwise, had it been promptly notified.

APPEAL by defendants from *Lyon, J.*, at February Term, 1918, of NEW HANOVER.

This action was brought to recover $705 with interest, being the amount of the deposit of the plaintiff in the defendant Savannah Trust Company.

The defendant trust company sent to plaintiff bank from Savannah by mail, in November, 1912, a check drawn by Lybrand & Co. on the bank of Swansea, S. C., payable to the Reliance Fertilizer Company. Defendant bank gave credit to the Reliance Fertilizer Company for the amount of the check, and the fertilizer company checked on the same in the usual course of business.

The plaintiff bank received the check at Wilmington on 22 November, 1912, credited it to the defendant Savannah Trust Company, and in the usual course of business said credit was balanced off by dealings between the two banks. On 22 or 23 November the plaintiff sent the check directly to the Bank of Swansea on which it was drawn for collection.

The plaintiff did not mention or intimate to the Savannah Trust Company that the check was not paid until more than a month afterwards, by letter dated 30 December, and received by the bank in Savannah Monday, 2 January.

When the defendant notified the payee, the Reliance Fertilizer Company, that the check had not been paid the defendant trust company requested the fertilizer company to allow the amount to be charged back to them which said company refused to do because of the length of time that had elapsed, and the defendant trust company admitted its liability on account of the lapse of time.

The check has never been paid although both the plaintiff and the trust company have tried to collect it, the latter doing so as a courtesy and not a duty. The plaintiff then, because the defendant trust company refused to reimburse the plaintiff, brought this suit attaching the trust company's funds.

From a verdict and judgment in favor of the plaintiff the defendant appealed.

McClammy & Burgwin for plaintiff.
John D. Bellamy & Son for defendant.

CLARK, C. J. When this case was here on the former appeal, *Bank v. Trust Co.*, 172 N. C., 344, the court held that it was negligence *per se* for a bank to send a draft or check for collection to the bank on which the check was drawn; and further, that when the bank which has committed such negligence sues the bank, which had forwarded the check, for the amount which had been credited, and such original bank sets up as a counterclaim the negligence of the plaintiff in not notifying it of nonpayment, and in the delay of over a month without inquiry, that this was negligence *per se,* but that the burden of proof rested on the correspondent bank, which had forwarded the check to the plaintiff bank, to show that it had sustained damages, which raised an issue for the jury.

The defendant asked the court to charge: "If defendant had paid cash for the draft to the Reliance Fertilizer Company and admitted its liability for same, then if the jury shall find from the evidence, by the greater weight, that the plaintiff was negligent in not notifying the defendant within a reasonable time of the nonpayment, and thereby put it out of the ability of the defendant or its customer to collect the check, the defendant would not be liable to plaintiff in this action, and it would be your duty to answer the issue 'No.'" The court so charged but erred in adding, "Provided you further find the check would have been paid if it had been presented in due course and but for the negli-

gence of the plaintiff." If the plaintiff, after giving credit to its customer for the check remitted to it, and though the check would not have been paid if presented, still if for forty days it delayed to inform the customer that the check had been lost or had not been paid, and in the meantime the drawer, Lybrand, had become insolvent, thus depriving the customer bank of the recovery from Lybrand of the amount which it had credited and paid to the fertilizer company for such check, the plaintiff bank certainly cannot recover the sum thus lost by its customer by such negligent delay, and this irrespective of the fact, if it be a fact, that the drawee bank would not have paid the check if promptly presented, or even if it was presented and payment refused. It was the duty of the plaintiff bank to give prompt notice of the refusal to pay or of the loss of the check so that the customer bank should have opportunity to protect itself.

If upon the evidence the jury shall find that if such notice had been given in due course by the plaintiff bank the customer bank could have saved itself from loss, then the jury should have found upon the issue that the defendant bank was entitled to recover on its counterclaim any loss it sustained by reason of such negligent delay.

It is not necessary in this view to consider the other exceptions.

Error.

E. T. BARNES ET AL. v. G. R. SALEEBY ET ALS.

(Filed 2 April, 1919.)

1. Justices' Courts—Appeal—Docketing Appeal—Term—Notice.

The appellant from a justice of the peace judgment should docket his case at the next criminal or civil term of the Superior Court, and upon his failure to do so the court has not the power to allow it, though when docketed in time the court may allow notice of appeal to be given *nunc pro tunc*.

2. Justices' Courts — Appeals—Terms—Judge's Absence—Procedure—Subsequent Term—Statutes.

When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over, under our statute, in the same plight and condition, to the subsequent term. Revisal, sec. 1510.

3. Same—Motions—Recordari.

Where a justice of the peace has failed to send up a judgment appealed from in the time required by statute, the appellant should file his motion for a *recordari*, in the absence of the judge, to hold the courts at that term, which would carry the matter to the subsequent term for disposition.

4. Justices' Courts—Appeal—Term of Court—Motions—Optional Procedure —Dismissal.

Where a transcript of judgment on appeal from a justice of the peace has not been docketed in the Superior Court at the proper term, the right of the appellee to have it docketed and dismissed under Revisal, 608, is optional, and the remedy given by the statute is not exclusive.

5. Landlord and Tenant—Lease—Contracts—Parol—Statutes of Fraud— Consideration.

A parol promise made by the lessor during the continuance of a written lease for a term, that he would not thereafter rent the premises to another than the lessee, when occupied by him, without giving him an opportunity to renew the lease, is ineffectual, it being for an indefinite period, void under the statute of frauds and without consideration.

6. Appeal and Error—Frivolous Appeals—Dismissal—Landlord and Tenant —Parol Lease—Statute of Frauds—Consideration.

When it appears on appeal from a judgment of the Superior Court against the defendant in summary ejectment that the only grounds relied on for his continuing in possession is an oral contract, void under the statute of frauds and without consideration, the appeal will be dismissed as frivolous and for the purpose of delay.

7. Justices' Courts—Appeals—Docketing—Dismissal—Agreement of Parties.

Where a justice of the peace judgment should be dismissed in the Superior Court for failure of the appellant to docket his appeal at the proper term, and the appellant has refused the appellee's offer to try the case upon its merits, its trial there otherwise must be with the appellee's consent, and the appeal will be dismissed.

ALLEN and HOKE, JJ., concur in result.

APPEAL by defendants from *Bond, J.*, at February Term, 1919, of WILSON.

This action—summary proceedings in ejectment—was begun before a justice of the peace in Wilson County on 2 January, 1919, and heard the same day. Judgment for possession and for costs was rendered, from which the defendant in open court, 2 January, 1919, gave notice of appeal to the Superior Court, and filed with the justice a bond to stay execution. The next ensuing regular term of the Superior Court was scheduled by statute to be held the week beginning 13 January, 1919. The judge did not attend that term of the court, although the clerk had placed all cases returnable to and pending in the court on the docket. The justice before whom the case was heard did not make any return of the notice of appeal until 1 February, 1919. The appellant did not file with the clerk any motion or papers of any kind, with reference to the case, during the week commencing 13 January, 1919.

A regular two-weeks term of the Superior Court of Wilson convened on 3 February, 1919. On the first day of the term the plaintiff made a motion, on notice to the defendant, to dismiss the appeal, stating that

he desired the appeal dismissed, but if the defendant would consent to a trial of the case on its merits, the motion to dismiss the appeal would be withdrawn and the case tried on its merits. The court continued this motion until Thursday of that week, when the motion was again made—the plaintiff again offering to withdraw the motion if the defendant would consent to a trial of the case on its merits. The case could not be tried except by consent because of Rule 24 of Practice in Superior Court. Upon the defendants again declining to consent to a trial of the case on its merits, the plaintiff insisted on his motion, and judgment dismissing the appeal was entered as set out in the record. From the judgment dismissing the appeal the defendant gave notice, in open court, of an appeal to the Supreme Court, and filed bond for rent, to stay execution as provided by statute.

As appears from the certificate of the clerk of the Superior Court, the defendant has paid into the office of the Clerk of the Superior Court seventy dollars ($70) rent due from 1 January, 1919, to the date of the judgment, 6 February, 1919.

On 8 February, 1919, the appellees served notice on the appellant that motion would be made in the Supreme Court at the opening of court on Tuesday, 18 February, 1919, to docket the appeal and dismiss same for the reason that the appeal was not taken in good faith from any error in the judgment, as would appear from an inspection of the record, but was taken merely for the purpose of delay.

This motion was made on 18 February, and the court ordered the transcript printed and the appeal placed at the foot of the calendar of the Seventh District for hearing.

W. A. Lucas for plaintiffs.
John E. Woodard for defendants.

CLARK, C. J. The defendants entered into the possession of a store on Nash Street, in Wilson, on 1 January, 1914, under a written lease, by the terms of which the defendants were to make certain repairs, in consideration of which they were to enjoy the occupancy of the premises at a stipulated rent for a term of five years ending 31 December, 1918.

In the answer of the defendants to the motion made in this Court to dismiss the appeal, the defendants say that after the repairs had been made and they had been in the possession of the property for two years or more, they approached the plaintiff, E. T. Barnes, and requested him to negotiate with them before the property was leased to others, and the plaintiff Barnes said that he would do so.

On 1 January, 1917, the plaintiff, E. T. Barnes, in a written contract leased the property to the Barnes-Graves Grocery Company, his co-

plaintiff, for a term of three years commencing 1 January, 1919, and immediately notified the defendants of this fact. On 1 January, 1919, the defendants refused to vacate and surrender the possession of the property, and this action was instituted.

There was no error in dismissing the appeal from the justice of the peace. Judgment was rendered and notice of appeal to the Superior Court given in open court when the judgment was rendered on 2 January, 1919. The next term of Wilson Superior Court was 13 January, 1919.

Appeals from justices' judgments should be docketed at the "next term." *Barnes v. R. R.,* 133 N. C., 131; *Sondley v. Asheville,* 110 N. C., 89; *Ballard v. Gay,* 108 N. C., 544. "Next term" means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. *Blair v. Coakley,* 136 N. C., 408; *Johnson v. Andrews,* 132 N. C., 376; *Pants Co. v. Smith,* 125 N. C., 588; *Davenport v. Grissom,* 113 N. C., 38; *Sondley v. Asheville, supra.*

The Superior Court has no power to permit the docketing of an appeal at a term subsequent to the one to which it should have been returned, though if the appeal is docketed it can allow for cause the notice of appeal to be entered, *nunc pro tunc. Davenport v. Grissom, supra; Abell v. Power Co.,* 159 N. C., 348. The fact that the judge did not attend the January term did not relieve the appellant of the duty of seeing that his appeal was properly docketed at the "next ensuing term." All matters pending at the January term were, by operation of Rev., 1510, carried over to the next term in the same plight and condition. *S. v. Horton,* 123 N. C., 695.

If the defendant had filed his motion for a *recordari* during the week commencing 13 January, as it was his duty to do, then the motion would have gone over to the February Term and the rights of the defendant would have been preserved. Besides, no merits were shown to justify the application for a *recordari.* It is true the appellee could have docketed the appeal at the January Term of the Superior Court and have moved to dismiss, Rev., 608, but this was optional and not a requirement, and failure to do this was not an estoppel upon the appellee. *Davenport v. Grissom, supra.*

In the third paragraph of the defendant's answer to the petition filed in this Court for a dismissal of the appeal, the defendant attempts to justify his holding over after the expiration of the term, and uses the following words:

"In 1916, long before the expiration of his lease, the respondent, desiring to retain possession of said premises, so expressed himself, with interest and earnestness, to the petitioner, who, in the conversa-

tion referred to above, and upon several occasions, both prior and subsequent to that time, assured respondent that he had improved the property, had paid his rents promptly, and had, in every way, made an entirely satisfactory tenant, and that he would not rent the property while it was occupied by respondent, without first giving the respondent the refusal thereof and an opportunity to *renew his lease.*"

This was denied by the plaintiff, and being on its face a verbal contract to lease for an indefinite period is void; moreover, it is not enforceable because without consideration.

The allegation, if it were admitted, that the defendant having made some improvements on the land, the plaintiff verbally promised to renew the lease, would not avoid the statute of frauds when pleaded. *Product Co. v. Dunn,* 142 N. C., 474. Even partial payment of the purchase money, or of lease money, would not validate a verbal contract rendered void by the statute of frauds.

"As between a landlord and his tenant, the latter, in the absence of an agreement therefor, has neither a legal nor an equitable right to a renewal of his lease, and, in the case of a written lease, evidence of an oral contemporaneous agreement to renew or extend the lease is not admissible to add to the written release, in accordance with the general rule that evidence of oral contemporaneous agreements are inadmissible to add to or vary written contracts." 16 R. C. L., 883, and cases there cited. The promise here alleged to have been made during the term is void because not in writing and of uncertain duration.

Even where the agreement is in writing, and in the lease itself, giving the lessee the "privilege of occupying the premises till such further time as he may wish on the same terms, the right to renewal has been denied upon the ground that the duration of the proposed new lease was uncertain." 16 R. C. L., 886. *A fortiori* is this true where the alleged agreement is oral and is without any consideration to support it.

An option in the original lease to renew would not be without consideration, but "a promise during the lease to give the tenant such option is without consideration, besides being void if not in writing." 16 L. R. A., 886.

The plaintiff's motion to dismiss in this Court should be allowed. Wherever it appears upon the record, as in this case, that no serious assignment of error is made, the appeal will be dismissed. *Blount v. Jones,* 175 N. C., 708; *Ludwick v. Mining Co.,* 171 N. C., 61. It is true that the defendant has given bond for the rent during the delay, but this does not deprive the plaintiff of his right to the custody of his own property. He may have leased the property to his coplaintiffs at a higher rent, or it may be that he has objection to the continuance of the defendant as his renter. Otherwise he would doubtless have renewed

the lease. It is not incumbent upon the plaintiff to show why he did not renew the lease to the defendant.

The defendant was offered opportunity in the court below at the February Term to try his case, and did not choose to avail himself of it. In the court below, and here, the ground asserted by the defendant for retaining the plaintiff's property after the expiration of the lease is on its face invalid and frivolous.

There was no error in the dismissal of the appeal below and the motion to docket and dismiss in this Court is allowed. The plaintiffs should not longer be kept out of possession without legal cause.

Appeal dismissed.

FRANK C. HEADMAN, EXECUTOR, ET AL. v. BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY, THE CITY OF SOUTHPORT, AND PHILIP ALLEN.

(Filed 2 April, 1919.)

1. Municipal Corporations — Sales — Taxes — Tender — Waiver—Actions—Cloud on Title.

Where lands have been sold by a county or municipality for the nonpayment of taxes, and the one claiming as the true owner brings suit to remove the sheriff's deed as a cloud upon his title, a refusal of the amount thus due, by the one entitled to receive the taxes, is a waiver of any tender of the taxes as required by the statute, and the plaintiff may maintain his suit.

2. Same—Judgments.

Where the plaintiff has succeeded in his suit to remove a tax deed as a cloud upon his title to lands, the courts will require as a condition of entering judgment upon the verdict that plaintiff pay into court the amount of the taxes, for the use of the party entitled thereto, or to him directly, with any other amount due by way of penalty or interest.

3. Taxation—Pleadings—Payment—Evidence.

It is only required that the payment of taxes be *shown* before plaintiff can recover in his suit to remove a tax deed as a cloud upon his title to lands, and it is unnecessary that such payment be *pleaded*.

4. Taxation—Lands—Description—Listing—Owner—Statutes.

Where lands have been sufficiently described in listing them for taxation, the fact that they were not listed in the name of the true owner will not invalidate the sheriff's deed when the listing is otherwise sufficient. Revisal, sec. 2894.

5. Taxation—Receivers—Deeds and Conveyances—Tax Deeds—Municipalities—Foreclosure—Rights and Remedies—Statutes.

The statutory right to sell lands in a receiver's hands is cumulative

to that given the sheriff against the owner, and the latter is not deprived of his right to pay or tender payment of the taxes due where it is necessary to protect himself against loss. Revisal, secs. 2879, 2862.

6. Same—Parties—Cloud on Title.

In a suit by the owner of lands in a receiver's hands to remove a tax deed as a cloud upon his title, the receiver should be made a party under the direction of the court which has appointed him, as the assets in his hand are involved, and may be impaired in the event that the tax deed be eventually declared valid.

7. Taxation—Sales—Purchasers—Municipal Corporations—Counties—Foreclosure—Deeds and Conveyances—Statutes.

The right of a county or municipality to become purchasers at their sales of lands for the nonpayment of taxes depends upon the statutes in force at the time, and the right given them to foreclose under the provisions of Revisal, sec. 2912, is an additional remedy to that of receiving a deed direct from the sheriff, Revisal, secs. 2899 *et seq.*, amended by ch. 558, sec. 18, Laws of 1901 (Pell's Revisal, sec. 2905), and when the latter course has been followed, objection that the only method was by foreclosure is untenable.

8. Appeal and Error—Demurrer—Fragmentary Appeals—Objections and Exceptions—Judgments.

On appeal from an order overruling a demurrer to the complaint only those grounds of objection which, if sustained, would dismiss the action, or cover the entire case or would finally dispose of it, will be considered; and where the suit is to remove a tax deed as a cloud upon the plaintiff's title to lands, and, among other grounds of demurrer taken, there is one, a ruling upon which does not dispose of the case, an exception as to this should be entered and reserved for final judgment, an appeal therefrom being fragmentary, and where such grounds as permit of appeal have been held untenable, the other will not be passed upon.

9. Costs—Appeal and Error—Demurrer.

Where on appeal from a demurrer to a complaint some of the grounds for the demurrer have been sustained and others overruled, the Supreme Court may, in its discretion, direct that the costs of appeal be equally divided between the parties.

ACTION tried before *Stacy, J.*, upon demurrer, at August Term, 1918, of BRUNSWICK.

Appeal by defendants.

E. K. Bryan for plaintiffs.

C. Ed. Taylor for Brunswick Co., Cranmer & Davis for City of Southport, Russell W. Richmond, Joseph W. Ruark, and Robert Ruark for defendant Allen.

WALKER, J. The plaintiffs alleged in their complaint that a deed under a tax sale of their land had been fraudulently obtained, and that

the notice required by the law, before such a deed is executed, was not given, and that plaintiff's only remedy was by foreclosure, and that the land was in the hands of a receiver, and was improperly listed in the name of the Southport Land Company, and by reason of the defects in the sale and deed a cloud has been put upon their title which they ask to be removed.

The defendants demurred to the complaint, assigning the following grounds of demurrer, which will be stated and considered in their proper order:

1. That plaintiffs had not paid the taxes due for the years 1914 and 1915, for which the land was sold. The plaintiffs alleged that they were willing and ready to pay the taxes and tendered them to the defendant entitled to receive them, and that he will not receive them. This, of course, is admitted by the demurrer, or rather to be considered as admitted, for the purpose of deciding the legal questions raised by it. *Balfour Quarry Co. v. Am. Stone Co.,* 151 N. C., 345; *Brewer v. Wynne,* 154 N. C., 467; *Kendall v. Highway Commission,* 165 N. C., 600. The defendant cannot be forced to accept payment of the taxes, and his refusal is a waiver of further tender, and dispenses with the necessity of it. *Beck v. Meroney,* 135 N. C., 532 (a tax sale case). This is also the usual rule as to a tender. *Abrams v. Suttles,* 44 N. C., 99; *Bateman v. Hopkins,* 157 N. C., 470; *Gallimore v. Grubbs,* 156 N. C., 575; *Blalock v. Clark,* 133 N. C., 306, and *Gaylord v. McCoy,* 161 N. C., 685, where this Court said: It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. And this was also held in *Mobley v. Fossett,* 20 N. C., 93 (bot. p. 94); *Martin v. Bank,* 131 N. C., 121; *Terrell v. Walker,* 65 N. C., 91. In *Mobley v. Fossett, supra,* it was held that when a party is bound by his agreement to make a tender of an article at a particular place, and the other party apprises him that he will not receive the article at all, it dispenses with the necessity of making the tender, citing 2 Starkie on Evidence, p. 778. But while this is so, if the plaintiff finally prevails in this action, the court will require, as a condition of entering a judgment upon the verdict, that plaintiffs pay into the court the amount of the taxes for the use of the party entitled thereto, or to him directly, with any other amount due by way of penalty or interest. Brunswick County and the City of Southport, it is presumed, already have received their taxes, and the defendant Philip Allen may have paid them, so that no other payment is now necessary, but inquiry will be made as to this matter and the facts found, so that the proper judgment may be rendered and the amount of

taxes and other amounts due may be paid. *McLaurin v. Williams,* 175 N. C., 291. The county and city, or their assignee, must have all taxes and charges due to them, or to those claiming under them, before any decree is entered on the verdict, if the plaintiff finally gets one. The payment of taxes is only required to be *shown,* not pleaded. *Beck v. Meroney,* 135 N. C., 532; *Moore v. Byrd,* 118 N. C., 688.

2. That listing the land in the name of some one other than the true owner did not invalidate the sale of the land for the taxes, as alleged by the plaintiff. We have so held in several well-considered cases. *Peebles v. Taylor,* 118 N. C., 165; *Moore v. Byrd, supra; Eames v. Armstrong,* 146 N. C., 1, and in the recent case of *Stone v. Phillips,* 176 N. C., 457, in which attention is called to Revisal of 1905, sec. 2894, which reads as follows: "That no sale of real estate shall be void because such real estate was charged in the name of any other than the rightful owner if such real estate be in other respects sufficiently described. But no sale of real property so listed in the name of the wrong person shall be held valid when the rightful one has listed the same and paid the taxes thereon." *Stone v. Phillips, supra,* cites *Taylor v. Hunt,* 118 N. C., 168, as approving the principle embodied in the statute, and distinguishes *Rexford v. Phillips,* 159 N. C., 213, in which case it appeared that there had not been any listing of the property as the law required, but the placing on the books of an indefinitely described part of a large body of land by a person having no semblance of authority, in law or in fact, for doing so. To have permitted such a false and unauthorized listing and description to bind and conclude the owner would have been a plain act of injustice, which is not warranted by any reasonable construction of the statute, and is directly contrary to its expressly declared purpose. The *Stone case* holds, in a well-considered opinion by *Justice Hoke,* that the listing of property in the name of a person other than the true owner will not invalidate a sale of it for the taxes, which is otherwise free from fatal defects, and this opinion we again approve. Counsel who argued the present case before us (Mr. Robert Ruark) correctly understood and stated in his argument and in his brief the palpable distinction between *Rexford v. Phillips,* 159 N. C., 213, and the cases holding that the mere listing in the wrong name, when the property is sufficiently described, will not invalidate a sale for taxes.

It can make no difference, as to the validity of a tax sale, that the property was in the custody of a receiver, appointed by the court, while the taxes were due. Revisal of 1905, sec. 2879, provides fully for such a case, and section 2862 requires a receiver and other fiduciaries named therein to pay the taxes assessed against the trust property, and makes him liable personally to the sheriff, by an action against him, and in damages to the owner of the property, who suffers loss by his default,

for the failure to pay the taxes out of the trust fund in his hands. But we do not think this section deprived the owner of the right to protect his property, although held in trust by a receiver, by making a tender of the taxes to save it from a sale and the consequent loss of it by him. Such was not the intent and meaning of this section, which was to give an easy remedy to the sheriff against the trustee or receiver, which was cumulative to that against the owner, and it could not have been intended that the owner should be made to see his property sacrificed by the neglect of a receiver, and not be able to save it by paying the taxes, and such an injustice would be aggravated and more apparent when the receiver really had no funds with which to pay them, as may happen to be the case in some instances. It would be proper, at least, to make the receiver a party to this action, as he has an interest in it. The court by which he was appointed would, upon proper application, direct him to make himself a party, as the fund in his hand is involved, and will be lost in the event the sale eventually is held to be valid.

3. The plaintiff further alleges that the only remedy of the county and city was by foreclosure. This was so at one time, but the statute has been changed, and each case must be decided under the law existing at the time of the particular transaction. With reference to this question, the Chief Justice said, in *Townsend v. Drainage Comrs.*, 174 N. C., 556, 559: "The appellant contends that Revisal, 2912, requires the purchaser at a tax sale to bring an action to foreclose upon his tax certificate, and that this is his only remedy. In this he is in error, for section 2912 gives this as an additional remedy, and uses the following language: 'The holder of a deed for real estate sold for taxes shall be entitled to the remedy provided in this section (2912) if he elect to proceed thereunder,' or he may proceed to acquire a deed from the sheriff as otherwise pointed out in sections 2899 to 2907 of the Revisal. Every individual purchaser has two remedies, one to proceed under the statute to require a deed, and the other to foreclose by action in court under section 2912. Formerly if the county was purchaser it had only the right to foreclose (*Wilcox v. Leach*, 123 N. C., 74), but this was changed by Laws 1901, ch. 558, sec. 18 (now Pell's Revisal, 2905), which provides that the sheriff can execute a deed upon the demand of the county commissioners or the governing board of a municipal corporation in the same manner as in cases where individuals have purchased." And *Justice Hoke* said in *Lumber Co. v. Lumber Co.*, 169 N. C., 80: "It may be well to note that, under the present law (Revisal, sec. 2905), a county purchasing land for taxes may take a deed therefor without resorting to foreclosure (*McNair v. Boyd*, 163 N. C., 478), and this case holds, too, that it is only when the owner has been in possession that

the ordinary statutes of limitations do not operate against him." So we find this matter to be settled by statute and adjudication.

4. We have so far considered only those grounds of objection which, if sustained, would dismiss the action. In other words, they cover the entire case, and may finally dispose of it. But the next allegation of the plaintiff, as to the failure of the purchaser to give notice before the deed was made by the sheriff, which also was demurred to, embraces only a part of the cause of action, and if sustained will not dismiss it, as there is another ground left upon which the plaintiff may recover. When this is the case we do not review the overruling of the demurrer, but allow defendant to except and leave a decision upon the question to the final hearing. An appeal from the ruling is premature and fragmentary. We so held in *Shelby v. R. R.*, 147 N. C., 537, which was approved in *Chambers v. R. R.*, 172 N. C., 555, citing numerous decisions of this Court in support of the rule. There is a full discussion of the point in the latter case, but it may be well to quote the language of the present *Chief Justice* in *Shelby v. R. R., supra,* where it is said, at p. 537: "The defendant pleaded in its answer two separate and distinct defenses. The plaintiff demurred to one of them, as he had a right to do. Revisal, sec. 435. The demurrer was overruled, and the plaintiff appealed. This is obnoxious to the rule forbidding fragmentary appeals. An appeal from a ruling upon one of several issues will be dismissed. *Hines v. Hines,* 84 N. C., 122; *Arrington v. Arrington,* 91 N. C., 301. The plaintiff should have noted his exception, and the judge should have proceeded with the trial upon both issues. If both issues, or only the issue as to this defense, were found with the plaintiff, he would not need to review the order overruling the demurrer as to this; but should he desire to do so, the overruling the demurrer as to this issue can be as well reviewed on appeal from the final judgment. It is true that the plaintiff will have to try this issue, but, aside from the presumption that the judge ruled rightly, it is better practice that the issue raised by the second defense should be tried, even unnecessarily, than that an action should thus be cut in two and hung up in the courts till it is determined, after much delay, on appeal, whether two issues or one should be tried. It is better to try both, and, after final verdict and judgment, pass upon the validity of the defense demurred to, if the result is such as to make the plaintiff still desirous to review it, which he will not be if he gain the case, nor if he lose on the other issue without ground of exception thereto." And again, at page 558: "Hence fragmentary appeals like this, and premature appeals and appeals from interlocutory judgments, usually are not tolerated. It can prejudice neither party to have the issue as to the second defense found by the jury (plaintiff's exception being noted) at the same time the issue as

to the other defense is found. With all the parties before the court, and the facts fully brought out, a correct conclusion is more likely to be reached by both judge and jury." In *Knott v. Burwell,* 96 N. C., 272, where there was a demurrer to a matter of defense and also to a counterclaim presenting a very strong illustration of the doctrine, it was said: "The demurrer being sustained by the court, and the counterclaim disallowed, the defendant appealed, and at the same time moved the court to suspend further proceedings in the action until the appeal could be heard and decided. This was also refused and the trial ordered to go on. To these rulings the defendant's first exception is taken, and it is, in our opinion, without support in law. The proposed appeal was premature, and the exception being noted upon the record, the ruling would come up for review after the final hearing upon an appeal then taken, and this opportunity is now afforded the defendant." Commenting on these cases (and the same question we are now discussing) in *Chambers v. R. R., supra,* at pp. 558, 559, this Court said: "To the same effect is *Bazemore v. Bridgers,* 105 N. C., 191. So it will be seen that the practice and procedure in such cases has been thoroughly settled by decisions above considered. *Justice Reade,* in *Comrs. v. Magnin, supra* (78 N. C., 181), strongly intimated that the result, as declared in the above cases, was in accordance with the true construction and meaning of The Code, and if there were any cases to the contrary it might be well for this Court to settle the matter finally by the adoption of a rule forbidding such premature and fragmentary appeals and requiring an exception to be noted to the adverse ruling so that the trial of the case can proceed. The point may be reserved for consideration upon appeal at the final hearing. We think that it will, perhaps, be found that the cases in which appeals have been entertained in this Court from the overruling of demurrers are those where a decision of the question would finally dispose of the case, and not merely be one step forward, and perhaps a useless one." We further said in the *Chambers case:* "The practice we here adopt as the preferable one, besides having been settled by our decisions, is not, in principle, unlike that in cases of nonsuit, where the courts have held that, upon an adverse intimation of the court, the plaintiff may submit to a nonsuit, if he so desires, but he cannot appeal from the judgment of nonsuit, entered upon his submission, and have it reviewed in this Court, if there is *any* ground left upon which he may recover, for the ruling must go to the whole case and prevent a recovery before an appeal will lie. We have so held during this term in *Chandler v. Mills,* 172 N. C., 366, where it is said: 'The nonsuit and appeal were prematurely taken. The law with respect to this matter has been thoroughly well settled by this Court. Before a plaintiff can resort to a nonsuit, and have any proposed ruling of the

trial court reviewed here by appeal, the intimation of opinion by the judge must be of such a nature as to defeat a recovery. If there is any ground left upon which the plaintiff may succeed before the jury, after the elimination of all others by an adverse intimation, the remedy is not by nonsuit and appeal, but the case should be tried out upon the remaining ground, for the plaintiff may recover full damages, in which case no appeal by him would be necessary. In other words, the threatened ruling must exhaust every ground upon which a verdict could be had, and therefore be fatal to plaintiff's recovery'," citing *Hayes v. R. R.,* 140 N. C., 131; *Hoss v. Palmer,* 150 N. C., 17; *Merrick v. Bedford,* 141 N. C., 504; *Midgett v. Mfg. Co.,* 140 N. C., 361.

It may well be said here, in illustration of the rule and as showing its practical working to be in favor of a reasonable expedition of trials and how it is preventive of unnecessary delay, that if we should consider the question as to notice, and sustain the demurrer, we would be compelled to remand the case for the trial of the issue as to the fraud, and a demurrer may yet be filed to that cause of action and appeal taken, multiplying costs and causing vexatious delay, when defendant will lose nothing by excepting and reserving the question raised by him until the final hearing. He may even then take advantage of the alleged defect in plaintiff's case by a simple request for an instruction covering the point. If the jury, as remarked by the present Chief Justice in *Shelby v. R. R.,* should answer the issue as to the fraud in favor of the plaintiff, the other question will never arise again. There will be no necessity for deciding it. Besides the delay, therefore, there will be a waste of labor and an idle consumption of time in passing upon a question which may become entirely immaterial. Not longer than the last term of this Court it was said by *Justice Brown* in *Yates v. Dixie Fire Ins. Co.,* 176 N. C., 401: "We suggest to the judges of the Superior Court that fragmentary and premature appeals be not permitted. It is best that all the issues be determined and a final judgment rendered before a case is brought to this Court."

It, therefore, becomes unnecessary to consider what effect the want of notice from the parties, or the sheriff, of the sale and the intention to make a deed to the purchaser will have upon the case. The jury may find that there was an unlawful combination or conspiracy to defraud the plaintiffs, or that the notice was given, which would render vain and useless any decision upon the question just stated. The case of *Matthews v. Fry,* 141 N. C., 582, which was referred to by counsel on both sides, was decided under the Public Laws of 1897, ch. 169, and it has since been approved in several cases. *S. c.,* 143 N. C., 384; *Eames v. Armstrong,* 146 N. C., 6; *Warren v. Williford,* 148 N. C., 479; *Rexford v. Phillips,* 159 N. C., 213; *Board of Education v. Remick,* 160

N. C., 563; *McNair v. Boyd,* 163 N. C., 478. It was founded upon *King v. Cooper,* 128 N. C., 347 (opinion by the present Chief Justice), where the principle, which is applicable to such cases, is fully discussed. See *Jones v. Schull,* 153 N. C., 517 (by *Manning, J.*), in which *King v. Cooper* and *Matthews v. Fry* were specially approved and followed. The controversy in *Matthews v. Fry* and *King v. Cooper, supra,* was between the purchaser at the sale and the owner, and the notice of the purpose to make the deed to the former was intended to give a solitary and last chance to redeem the land by paying taxes, charges, costs and expenses. It was a wise provision to prevent what might turn out to be gross injustice, that is, to take his land without notice and an opportunity of paying the taxes, costs, expenses, and the large interest or per cent exacted by the statute, when no doubt he would be perfectly willing to pay it, and, too, it might be a small amount when compared with the true value of the land. But that statute was amended by Public Laws of 1901, ch. 558, sec. 20 (Revisal, sec. 2909), in material respects, which is mentioned by *Justice Connor* in *Eames v. Armstrong, supra,* and though we do not decide the question, as to the effect of that change in the law, we may again say, as we have already said, that each case must be governed by the particular statute applicable to it. *Jones v. Schull, supra.* It may be that the act of 1901 changes the law in the manner and to the extent that is claimed by the defendant, but we withhold our opinion upon this contention until it is properly presented.

We have carefully considered the case, and have been at much pains to state the contentions fully and to decide all questions within the compass of the appeal, as the whole matter and every detail of it came under elaborate discussion in this Court, and the questions were ably argued by counsel.

As we have sustained some of the grounds of demurrer and overruled others, we direct, in the exercise of our discretion, that the costs of this Court be equally divided between the parties, one half thereof to be taxed against the plaintiffs and the other half against the defendants.

The judgment is modified as above indicated.

Modified.

E. A. MAULTSBY, RECEIVER FOR NELLIE BRIGHT, v. C. O. GORE.

(Filed 2 April, 1919.)

Claim and Delivery—Evidence—Agreement—Trials.

Testimony that a receiver appointed by the court saw the defendant, who had the possession of certain personalty claimed by the receiver, and

had him surrender it to him, and then agreed to rent it from him pending the adjudication of the court as to its ownership, but thereafter, upon demand, refused to give up the property accordingly, is sufficient to sustain judgment upon a verdict in the receiver's favor.

APPEAL by plaintiff from *Devin, J.*, at the November Term, 1917, of COLUMBUS.

This is an action brought by the plaintiff as receiver to recover possession of a mule, a buggy, and harness.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Donald MacRackan and S. Brown Shepherd attorneys for plaintiff.
Irvin B. Tucker attorney for defendant.

ALLEN, J. The plaintiff testified as follows:

"I know the property described in the complaint filed in this action. The property consists of one grey mule, one top buggy, and one harness. I was appointed receiver in the case of *Nellie Bright v. T. L. Bright.* I went out to see Mr. C. O. Gore. His son claimed the property. He said the property was his and did not much want to give it up. They said they wanted to see their attorney. I told them all right; if they would agree to bring me the property next morning I would leave the property with them, and they said all right.

"I left their place, and when I had gone about one mile Mr. Gore and his son overtook me. They said they had decided to give me up the property, and I took the property and brought it to Whiteville and kept it all night.

"The next day there was a hearing in the case of *Nellie Bright v. T. L. Bright* before Judge Bond, and the case was continued, and I released the mule to C. O. Gore. Alton Gore claimed the mule.

"I rented the mule to C. O. Gore, the defendant, in the presence of Joe Byrd, and the understanding was he would keep the mule and pay me a nominal price for the use of the mule, not exceeding $3, provided Judge Bond ordered the mule to be returned back to Mrs. Nellie Bright, and they agreed to this. When Judge Bond ordered me to turn the property over to Mrs. Nellie Bright I went to Mr. C. O. Gore, to whom I rented the mule, and told him what the order of the court was, and he said he would have to see his lawyer, and when he came back and told me he would not give up the mule the matter went on for several days, and I did not take any other steps, and finally I did take claim and delivery."

This evidence shows that the plaintiff was appointed receiver in the case of *Nellie Bright v. T. L. Bright;* that as receiver he made demand

upon the defendant for the possession of the property in controversy; that the defendant and his son surrendered the possession of the property to the plaintiff; that the plaintiff then rented the property to the defendant for a nominal rent upon his agreement to abide by the order of the court in the action in which the plaintiff was appointed receiver as to the disposition of the property; that the court ordered the property to be delivered over to Mrs. Nellie Bright, and that upon demand the defendant refused to surrender the property as he had agreed to do, and this, in our opinion, is ample evidence, if believed by the jury, to entitle the plaintiff to recover possession of the property.

There is error in the judgment of nonsuit.

Reversed.

IN RE E. E. GORHAM, ADMINISTRATOR OF JOHN C. GORHAM, DECEASED.

(Filed 2 April, 1919.)

1. **Evidence—Deceased Persons—Transactions and Communications—Statutes—Executors and Administrators—Dower—Principal and Agent.**

Where the administrator has brought proceedings to sell the lands of the intestate to pay his debt, subject to widow's dower, and it appears that only a part of the lands was owned by the intestate, and that he had taken title in the other part to facilitate transactions as selling agent for a bank, but to which proceedings the bank was not a party, the officers of the bank have no such direct legal or pecuniary interest in the result of a subsequent action, between the administrator and the widow, as would disqualify them from testifying to the fact of agency, under the provisions of Revisal, sec. 1631, in favor of the administrator and against the widow claiming her right of dower in the whole of the lands; and where their testimony was as to the contents of a written contract of such agency, it was not necessarily of a conversation or transaction between the bank and the deceased.

2. **Judgment—Estoppel—Executors and Administrators—Sales—Assets.**

Where a decree, in proceedings by an administrator to sell lands to make assets to pay a debt due by the estate to a bank, the bank not having been made a party, orders the lands to be sold subject to the widow's right of dower, leaving the entire funds subject to the further order of the court, and it appears that thereafter the administrator ascertained that the intestate acquired title to a part of the lands only as the selling agent of the bank, it does not estop the administrator from showing the facts of the agency and the amount due the bank, this matter not having been adjudicated or passed upon in the special proceedings.

3. **Dower—Widows—Rents—Sales—Interest.**

The widow's claim of dower in the lands of her deceased husband, while paramount to that of the heir, is not an estate but a right until allotment, continuing from the death of her husband; and from that

time she is entitled to damages, measured by the rental value, for the time she has been kept out of possession; and in case of sale of the lands to make assets to pay the debts of the deceased, interest on her proportionate part from the sale until payment, charging her interest, in return, for such sums as she may be indebted to the estate. The common-law principles relating to this subject and the statutory changes, discussed by *Mr. Justice Allen.*

4. Same—Heir in Possession—Election of Widow.

Upon the principles allowing the widow the rents from the lands of her deceased husband by way of damages for being kept out of her dower interest therein, the heir is chargeable only with the rents received while dealing with the property in good faith, or for the reasonable value of the premises if occupied by himself; and this principle obtains as to the proceeds of the sale of her dower lands when bought by her, except, at her election, she may take one-third of the rents collected after the sale in lieu of interest for the period covered by the rents, and she will be chargeable with interest on the purchase price.

5. Courts—Equity—Clerks of Court—Jurisdiction—Executors and Administrators—Sales—Assets.

While a statutory method by proceedings before the court is provided for the assertion by the widow of her right of dower in the lands of her deceased husband, the jurisdiction of the court of equity has not been disturbed, though usually some equitable element, such as the necessity for an accounting, must be alleged in the suit.

APPEAL by both parties from *Lyon, J.,* at chambers, on case agreed, February, 1919, from CUMBERLAND.

A controversy having arisen between E. E. Gorham, administrator of the estate of John C. Gorham, and the commissioner appointed to sell the lands of his intestate to create assets for the payment of the debts of the estate, on the one hand, and Mrs. Georgia Chedester, the intestate's widow, who has since married H. C. Chedester, on the other, and wishing the same to be determined without action they submitted a case, the material parts of which are as follows:

1. That John C. Gorham died intestate, 28 February, 1910, leaving him surviving the aforesaid widow, a brother, and sisters.

2. That E. E. Gorham qualified as administrator upon his estate 10 March, 1910, the widow renouncing in his favor.

3. That on .... May, 1911, said administrator filed a petition to sell intestate's lands to make assets to pay his debts, to which *ex parte* proceeding the widow and heirs at law of the intestate and F. H. Cotton and wife, Ila H. Cotton, as well as E. E. Gorham as an individual, were parties, which petition and all of the orders, reports, judgments, and decrees therein are hereby made a part hereof and asked to be so considered.

4. That at a public sale of some of the lands on 16 December, 1912,

the intestate's widow became the successful bidder for the first or residence tract, at the price of $9,200, and upon report thereof the same was confirmed on 12 May, 1913.

7. That by agreement the $9,200 was not paid but was to await the determination of her claims against the estate, and she and the administrator have been constantly endeavoring to ascertain the exact amount due her by him so that she could pay the difference, if any, between such sum and the amount of her said bid.

That the administrator rented the said residence from 10 July, 1912, until 10 October, 1917, the amount of rent ($1,890) being used by him as assets in his hands, for the payment of debts of the estate, and his annual accounts are made a part hereof and asked to be so considered.

13. That prior to the filing of the aforesaid petition in May, 1911, there was another special proceeding in said court, to which the administrator of John C. Gorham and the intestate's widow and heirs at law were parties, and also F. H. Cotton and his wife, numbered 2,066 and 2,214 on the special proceeding docket, in which E. E. Gorham was appointed commissioner to sell the McKethan lots, Nos. 5, 6, 7, and 9, alleged and adjudged to have been owned by intestate and F. H. Cotton, under authority of which the said commissioner sold lots 5, 6, and 7 for $2,900 on 1 December, 1910, and lot No. 9, 8 February, 1912, for $1,600. It was further alleged in the petition and adjudged by the court that the indebtedness due the bank on the purchase price of said lots was about $2,600. The aforesaid proceeding is made a part hereof and asked to be so considered. The administrator now contends that his intestate and F. H. Cotton were not in fact the owners of the said McKethan lots, but were the selling agents for the Bank of Fayetteville, who were the owners, and that they had taken title thereto to facilitate a conveyance of the same; that under the terms of the selling agreement with the bank the administrator turned over all proceeds of sale to the bank and received $275 as full payment of the amount due the estate of John C. Gorham on the sale of all the said lots; and that the allegations of the petition and the judgment rendered thereon were based upon such information as the administrator then had as to the ownership of said lots and the indebtedness due thereon, and which information he believed to be true at the time said petition was filed and judgment rendered, but which information he afterwards found to be incorrect and the facts to be as hereinbefore stated. Mrs. Chedester pleads the said proceeding as an estoppel against such claim and contention. She denies that John C. Gorham and F. H. Cotton were not the owners of said lots. Subject to her denial and plea of estoppel as aforesaid, it is agreed that the judge to whom this controversy is sub-

mitted may hear competent evidence on this point and find the facts in regard thereto.

It was also agreed that the administrator was due Mrs. Chedester certain amounts from the proceeds of sales of certain lands as the value of her dower interest, but the parties could not agree as to the dates from which these amounts would bear interest.

The special proceedings referred to in the findings 3 and 13 were *ex parte* and were for the purpose of selling the McKethan lots for assets.

It was alleged in the petition in these proceedings that F. H. Cotton was owner of an undivided one-half interest in said lots and that the heirs of John C. Gorham were the owners of the other one-half, subject to the dower, and that all of said interests were subject to the claim of the Fourth National Bank of Fayetteville for $2,600, the balance of purchase money, and the decree of confirmation in the proceedings were in accordance with the allegations in the petition and recited the several interests as therein set forth.

The decree further required the administrator to collect the purchase money, total of the McKethan lots $4,500, pay off the bank debt, and hold one-half of the balance for distribution under the orders of the court.

The bank was not a party to the proceeding.

The McKethan lots were conveyed by the Bank of Fayetteville to the Southern Real Estate Company and then by the Southern Real Estate Company to Frank H. Cotton and John C. Gorham.

At the hearing of the agreed case the administrator was permitted to prove by John O. Ellington and Dr. Lilly, officers and stockholders of the bank, that at the time Cotton and Gorham took the title to said lots there was a written agreement, which was lost, that they would hold the title to the lots, as selling agent for the bank, to repay a larger sum than $2,600, and that after the sales were made and upon a settlement in accordance with the agreement that there was only $275 which went into the hands of the administrator from the McKethan lots, and this was paid as commissions for making the sales.

Mrs. Chedester objected to this evidence: (1) Because Ellington and Lilly were incompetent to testify under section 1631 of the Revisal. (2) Because the administrator was estopped by the special proceedings to show that more than $2,600 was due to the bank.

His Honor found upon this evidence "that Gorham, administrator and commissioner as aforesaid, is not estopped by the proceedings for the sale of said property, and that Cotton and Gorham held the same as selling agents for the bank, and that intestate's estate was entitled to

$275 as commissions, and that Mrs. Chedester is not entitled to dower in said property."

Mrs. Chedester again excepted.

His Honor entered judgment upon the agreed case from which Mrs. Chedester appealed, assigning as error, in addition to the exceptions before stated, the following:

1. "For that the court did not find and adjudge that Mrs. Chedester is entitled to interest on the value of her dower from 28 February, 1910, the date of the death of her former husband, John Gorham, and that if she is not entitled to it from that date, then from the filing of the petition for the sale of the McKethan lots as to them, to wit, 19 November, 1910, and from the filing of the petition as to all the other lands, to wit, May, 1911; and that in no event should the interest be calculated for a less period of time than from 10 March, 1912, which is two years after the qualification of E. E. Gorham as administrator, as claimed and contended for in the case agreed, paragraphs 15 (*a*) and (*b*).

2. "For that the court did not find and adjudge that she is entitled to interest on the value of her dower in the home place in accordance with her contentions as above set forth in the twenty-second assignment, instead of from 18 September, 1916, the date of Judge Winston's judgment in the former action between the parties concerning her claim for lien on said property, during which time the administrator received the rents therefor."

The facts and rulings thereon entering into the judgment of Judge Winston will be found in 173 N. C., 272.

Q. K. Nimocks attorney for administrator.
Sinclair & Dye attorneys for Mrs. Chedester.

ALLEN, J. The appeal presents three questions for decision:

1. Were the witnesses Ellington and Lilly competent under section 1631 of the Revisal to testify that Cotton and Gorham held the title to the McKethan lots as selling agents for the bank of which they were stockholders?

2. If competent to testify, is the administrator estopped by the special proceedings to sell lands for assets?

3. What are the rights of the widow of John C. Gorham as to interest on the value of her dower in the proceeds of lands sold and as to rents?

1. The interest, which disqualifies one from testifying under section 1631 of the Revisal, is a direct, legal or pecuniary interest in the event of the action (*Helsabeck v. Doub,* 167 N. C., 205), and as the bank has been paid in full, and there is no effort to make it refund any part of

the money collected, and it is in no way interested in the result of this action, there is nothing which disqualifies the witnesses Ellington and Lilly to testify.

Besides, they were not necessarily testifying to a conversation or transaction with the deceased but as to the contents of a lost paper, and their testimony was in behalf of the administrator and not against him.

2. The decree in the petition to sell land for assets did not purport to finally adjudicate the rights of the widow as to dower in the proceeds of sale, and, on the contrary, it only gave her a dower right in the interest of John C. Gorham after payment of the amount due the bank, stated to be $2,600, and left the entire funds subject to the further order of the court.

The bank was not a party to the proceeding, and its debt was not in issue nor was it litigated, and the amount was stated simply as one of the reasons for asking for a sale of the lands, and the proceeding therefore cannot operate as an estoppel to prevent the parties from showing the true amount due to the bank.

The case of *Latta v. Russ,* 53 N. C., 111, which is approved in *Austin v. Austin,* 132 N. C., 265, and in *Trust Co. v. Stone,* 176 N. C., 272, is in point.

There a petition was filed to sell land for assets, in which the several debts were stated and decrees of sale and confirmation entered, the lands sold, and the proceeds applied to the payment of debts. The administrator then died and an action was commenced for an accounting of the estate, in which a referee found that, allowing credits for vouchers, there remained in the hands of the administrator $882.22, but if the debts be allowed as stated in the decrees, there would be in hand only $252.45.

The judge of the Superior Court held that the decrees were binding on the parties as to the amount of the debts as stated in the petition, but this was reversed on appeal, the Court saying: "We do not concur with his Honor in the view taken by him of the question reserved, in respect to the effect of the decree giving the administratrix license to sell the land. That decree was an adjudication that it was necessary to sell and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt as against or in favor of creditors, or as against or in favor of the heirs."

As the evidence was competent and as there is no estoppel, the finding thereon by his Honor is binding on us and concludes the claim of the widow to dower in the McKethan lots.

3. The claim of the widow for dower, while paramount to that of the heir, is not an estate but a right until allotment. *Spencer v. Weston,* 18 N. C., 214. "It is true, indeed, that she cannot enter until assignment

made, and that in point of tenure, for feudal reasons, she holds of the heir or of the person in whom is the reversion of the land for dower; but, in point of title, her estate does not arise or take effect out of the ownership of the heir or other person making the assignment, but is considered a continuation of that of the husband; and although between the death of the husband and the assignment of dower a *seizin* of the heir or other person intervenes, yet upon the assignment she is in by relation from the death of the husband, for 'the law adjudgeth no *mesne seizin* between the husband and wife.' Perkins, s. 414, Co. Lit., 241." *Norwood v. Marrow,* 20 N. C., 584, approved in *Love v. McLure,* 99 N. C., 295, and in other cases.

This being the nature of the estate, it was held at common law to be the duty of the heir to allot dower to the widow immediately upon the death of the husband, and under Magna Charta she could remain in the mansion house forty days until the allotment was made, called her right of quarantine, and, upon default on the part of the heir, she could sue out her writ of dower; but, although establishing her right, she could not recover damages, nor was she entitled to an accounting of the rents and profits. This remained the law until the Statute of Merton, 20 Henry III, which not only perfected the process for the assignment of the dower, but also stimulated the heir to activity by permitting the recovery of damages for the detention of the dower.

The proceeding was at first in the courts of the common law, but the broader and more generous rules of equity being better adapted to adjust the rights between the heir and the widow, it soon became recognized as within the jurisdiction of courts of equity (9 R. C. L., 608 *et seq.*), and in this State, while a statutory remedy by proceeding before the clerk is afforded, the jurisdiction of the courts of equity has not been disturbed, although usually some equitable element, such as the necessity for an accounting, must be alleged. *Efland v. Efland,* 96 N. C., 488, and cases cited.

The recovery under the Statute of Merton, and under our statutory remedy, was "Not rents (which suppose a privity of estate) but damages for the detention of her dower, in assessing which the value of the rents is the proper guide to the jury" (*Sutton v. Burrows,* 6 N. C., 81), and it was held, with some hesitation, that *at law* the damages could only be recovered from demand. (*Spencer v. Weston,* 18 N. C., 216, approved *Brown v. Morrisey,* 126 N. C., 772.) "But it has been long settled that in equity a widow is entitled to an account of the *mesne* profits from the death of the husband up to the assignment of dower. Indeed this was one of the grounds upon which that court assumed jurisdiction." *Pearson, J.,* in *Campbell v. Murphy,* 55 N. C., 364.

Applying these principles, this proceeding being in equity, we are of

opinion that the widow, Mrs. Chedester, is entitled to an accounting of the rents and profits from the death of her husband up to the time of the sales of the several lots of land in which she was entitled to dower, and after the sales to the interest upon the value of her dower in the proceeds of the sales, and the case of *Campbell v. Murphy, supra,* is a direct authority upon both questions.

In that case Marsden Campbell, the husband, died in 1841 and his heirs rented the property until the buildings were destroyed by fire in 1843. In 1844 the land was sold under order of court for $4,000, and the court held that the widow was entitled to recover the rents from 1841, the time of the death of the husband, until 1843, this being the time when the heirs rented the property, and that she was entitled to interest upon one-third of $4,000 for which the land was sold under order of court.

The Court says: "It must be declared to be the opinion of the Court that the plaintiff is entitled to recover from the defendant Murphy the interest upon one-third of the sum for which the lot was sold at the sale made by the clerk and master mentioned in the pleadings, to wit, $4,000, from the date of that sale up to the taking of the account, and also interest upon such third part of the purchase money to be paid annually up to the time of her death, for which the plaintiff will have lien upon the premises as security, unless she elects to take the bond of the said Murphy, with approved sureties, in lieu thereof, or the plaintiff may elect to take a decree for such part of the purchase money aforesaid absolutely, with interest from the date of the sale, as is equal to the value of her life estate in one-third part thereof, as to which there may be a reference." And again: "These defendants insist that they are not chargeable with the rent received by them for the house from the death of the husband up to the time it was burned.

"There was no judgment for damages in a writ of right, or a writ of entry, or a writ of dower at common law, on the ground that the *terre-tenant,* during the time he was seized, had performed the feudal services. Damages were given against a disseizor by statute in an assize of *novel disseizin;* and damages are given to the widow by the Statute of Merton in a writ of dower *undè nihil;* but it has been long settled that in equity a widow is entitled to an account of the *mesne* profits from the death of the husband up to the assignment of dower. Indeed, this was one of the grounds upon which that court assumed jurisdiction."

It will be observed that under this doctrine the heir is not chargeable as a trustee, but only with the rents received while dealing with the property in good faith or for the reasonable value of the premises if occupied by himself.

These principles also cover the claim of the widow in the proceeds

of the sale of the lot bought by her, except that she may, at her election, take one-third of the rents collected after the sale in lieu of interest for the period covered by the rents, and she will be chargeable with interest on the purchase price.

The judgment will be modified in accordance with this opinion after the parties have agreed upon the amounts allowed the widow or after the facts have been ascertained by a reference.

Modified and affirmed.

SAMUEL THOMPSON v. THE STANDARD OIL COMPANY.

(Filed 2 April, 1919.)

1. Master and Servant—Employer and Employee—Duty of Master—Negligence—Safe Place to Work—Tools and Appliances—Order of Vice Principal.

In applying the principle requiring an employer, in the exercise of reasonable care, to furnish his employees a safe place to work and suitable tools and appliances therefor, including simple, ordinary tools, wherein the defect and the character of the work required by their use is of a kind to impart serious menace, and of which the employer knew or should have known by ordinary inspection, regard should also be had to circumstances, when they arise, tending to show that the employee acted in an emergency to his injury under the direct order of his superior employee, or the vice principal of his employer, directing the work at the time, with a natural impulse of present obedience.

2. Same—Evidence—Instructions—Trials.

In an action against an employer to recover damages for a personal injury alleged to have been caused by its negligence, there was evidence tending to show that the plaintiff, employed for other duties, was directed by defendant's vice principal to "scotch" a car operated by the defendant on a railroad track, at the place it was desired, and when it was rolling down grade with sufficient force to have crushed a plow point that the vice principal had placed to mark the place; that at the time the only implement the plaintiff had was similar in shape to a crow-bar, the end of which he placed upon the track, resulting in the other end striking him on the head causing serious injury: *Held*, sufficient upon which the jury could find that the plaintiff acted in an emergency under the negligent order of the defendant's vice principal, and a request for instruction was properly denied that the jury find the issues of negligence, contributory negligence, and assumption of risk in defendant's favor should they find the facts according to the evidence in the case.

ACTION tried before *Devin, J.*, and a jury, at the September Term, 1918, of ALAMANCE.

The action is to recover damages for injuries caused by the negligence of defendant company, the employer, in supplying plaintiff, an employee, with an improper tool or implement with which to do his work, to wit, placing a car on a railroad track in proper position, and by a negligent order as to the present use of said implement, given by a Mr. Fowler, who was there in personal charge of the work and who stood towards plaintiff and his coemployees in the position of vice principal. On denial of liability and pleas of contributory negligence and assumption of risk, the jury rendered a verdict for plaintiff, assessing substantial damages. Judgment on the verdict for plaintiff, and defendant excepted and appealed.

There was no evidence offered by defendant, and the errors assigned are that, at close of plaintiff's testimony, his Honor failed to instruct the jury as requested that, if they should find the facts to be as testified to by the witnesses, they must answer the issue of negligence and of contributory negligence and assumption of risk for defendant.

R. C. Strudwick and T. C. Carter for plaintiff.
Parker & Long and Jas. H. Pou for defendant.

HOKE, J. From the admissions in the pleadings and the facts in evidence it appears that in July, 1917, plaintiff and one or two others, coworkers in the employment of the defendant company for the purpose, were engaged in placing a tank car of the company, then on the railroad track, in a proper position in reference to one of its subsidiary tanks, to the end that its contents might be emptied into the stationary tank by means of a hose, etc.; that the work was being done in the presence and under the personal supervision and direction of one J. O. Fowler, also an employee of the company, and who stood towards plaintiff and his coworkers in the position of vice principal; that the tank car being a short distance out of position and down grade, plaintiff and his coemployees were "pinching" it up grade, using for the purpose a pinch-bar supplied by said Fowler from the company's tool-house on the premises. This pinch-bar is not described in the record, but it is evidently an implement or a tool made of wood and iron, designed for pushing a car up grade and affording a leverage, in part, by means of a long handle, fitted in some way into the contrivance or annexed as a part of it. It is sometimes spoken of by the witnesses as a crow-bar, and it is evidently similar to some extent though it is, as stated, in some way so constructed as to fit it for the purpose in which it was then being used. Speaking more directly to the occurrence, the plaintiff, testifying in his own behalf, said among other things: "The car was on the side track, south of the main track, and when we got there the car was not at the

right place, and Mr. Fowler said, 'Boys, it has got to be pinched up a little; it is not at the place.' We pinched it up and pinched a little too far ahead, and he applied the brakes and said, 'Boys, this car is a little too far ahead now.' He took a plow point and put in where he wanted the car to come, and he got back on the car to let the brakes off so the car would come down, but the car stood still and he said, 'Boys, get behind there and give it a little start.' I had the pinch-bar, and I went behind and pinched it, and it started to rolling, and I made right back for the front, and I looked up and Fowler was putting the brakes on, and he said 'Scotch it! Scotch it!' And I put the bar under it, and that is all I know. Fowler called, 'Scotch it, scotch it!' and I attempted to scotch it with the pinch-bar. That was all I had to scotch it with. There were brakes on both ends of the car, and Fowler was on front or west end of car. When we commenced to pinch he was on the car at the brakes, and he said, 'Boys, it is a little bit too far ahead now.' Me and Sam and Hoskins were pinching the car, and we pinched it too far east. Fowler put on brakes, and they held the car. The grade there slopes west. He told us to go behind, to the east end of the car, and give it a start. He had released the brake, and we pinched the car, and it began to roll west, and I came around on the south side of car and had pinch-bar in my hand and had gotten about middle way of car when Fowler said, 'Scotch it! Scotch it!' and I put pinch-bar under front end of the car, and that is all I remember."

Other witnesses confirmed this statement, saying also that just before getting on the car to manage the brakes Fowler put a plow point on the track to indicate where it should be stopped, and having directed his helpers to give the car a start, it rolled down the track, crushing the plow point, and he called to plaintiff, who had walked forward with the bar in his hand, "Scotch it, Sam; scotch it!" That plaintiff, in the endeavor to obey his order, put the end of the pinch-bar before one of the wheels when it was knocked up, the end striking plaintiff under the chin and knocking him onto the track and causing him to receive permanent and painful physical injuries. Further, Sam Caine, testifying for plaintiff, said: "Mr. Fowler got on top of car and took off brakes, and it would not start, and he told us to give him a little start. Mr. Fowler had put plow point on track where he wanted car to stop. Me, Sam Thompson, and Hoskins went to east end of car and pinched it and it started to roll west, and we started back to west end of car on south side, and Mr. Fowler said, 'Scotch it,' and I don't know whether he said Sam or not, but Sam Thompson ran with the crow-bar and put it under the wheel, and the crow-bar hit him under the chin, and that knocked him into the middle of the track. I had started to get a stick of wood at the brick kiln, which was not far, when I saw Sam Thompson was

struck. I went back to him and did not get the wood. Thompson was lying in middle of track, and his foot was mashed and his head and tongue cut. When the car rolled on the plow point it mashed it all to pieces. Sam Thompson had crow-bar when Mr. Fowler said 'Sotch it,' and neither of the other two had anything. Mr. Fowler had provided nothing to scotch it with except plow point."

It is the accepted principle in this State that an employer of labor, in the exercise of reasonable care, is required to furnish his employees a safe place to work and provide them with implements, tools, and appliances suitable for the work in which they are engaged. *Kiger v. Scales Co.*, 162 N. C., 133; *Mincey v. Coast Line*, 161 N. C., 467; *Reid v. Rees & Co.*, 155 N. C., 231; *Hicks v. Mfg. Co.*, 138 N. C., 319. And it has been repeatedly held that the position may be recognized in the case of simple, ordinary tools, where the defect "is of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and it is further shown that the employer knew of such defect or should have found it out under the duty of inspection ordinarily incumbent upon him in tools of that kind," etc. *King v. Atlantic Coast Line*, 174 N. C., 39; *Rodgerson v. Hontz, etc.*, 174 N. C., 27; *Wright v. Thompson*, 171 N. C., 88; *Reid v. Rees*, 155 N. C., 231; *Mercer v. R. R.*, 154 N. C., 399. And in this connection there are numerous decisions to the effect that the general directions or present and special orders of a boss or higher employee, one who represents the employer and stands towards the workmen in the position of vice principal, may be considered as a relevant fact when it is one from which in itself or in connection with the attendant circumstances the fact of negligence may be reasonably inferred. *Atkins v. Madry*, 174 N. C., 187; *Howard v. Oil Co.*, 174 N. C., 651; *Howard v. Wright*, 173 N. C., 339; *Wade v. Contracting Co.*, 149 N. C., 177; *Holton v. Lumber Co.*, 152 N. C., 68; *Noble v. Lumber Co.*, 151 N. C., 76; *Allison v. Ry.*, 129 N. C., 336; *Patton v. Ry.*, 96 N. C., 455.

Not only is an employer supposed, as a rule, to control the conditions under which the work is done and to have a more extended and accurate knowledge of such work and the tools and appliances fitted for same, but the order itself given by the employer or his vice principal directing the work and the natural impulse of present obedience on the part of the employee are additional and relevant facts to be considered in passing upon the latter's conduct in reference to the issue. Accordingly, several of the cases just cited are in illustration and support of the position that there is or may be a distinction in weighing the conduct of the employer and employee even when the principal objective facts are open to the observation of both. Thus, in *Patton v. R. R., supra*, defendant was held liable for a negligent order which caused an employee to jump from

a moving car, while the employee, obeying the order, was relieved of responsibility. The ruling apposite was stated as follows: "One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, if not appearing to the servant at the time that obedience would certainly cause injury, it was held that there was no such contributory negligence as would prevent a recovery." A similar position is approved in *Noble v. Lumber Co., supra,* and in *Allison v. R. R.* it was held: "When a section master fails to use reasonable care for the protection of persons working under him and one of them is injured, the company is liable for the negligence of the servant"; and further, "When a section master orders a person under him to throw a handcar off the track to prevent a collision with a freight train and the employee is injured in the execution of the act he is not guilty of contributory negligence." True, in several of these cases it is made to appear and weight is given to the fact that the employee in question was inexperienced, but this is not always or necessarily controlling; and, furthermore, in this instance it is not shown that these subordinates were regular employees of the company or that they had been doing work of this kind. On the contrary, it would seem from the record that they were engaged in other work and under another employer and were called in and hired by Fowler, the vice principal, to do this particular job, and it is the natural, certainly the permissible, inference that they were inexperienced in the work they were then doing. And, in reference to the issue as to assumption of risk, the Court, in *Wallace v. Power Co.,* 176 N. C., 561, speaking to the question, said: "In the recent case of *Howard v. Wright,* 173 N. C., 339, the position as it obtains here is stated as follows: 'The defense of assumption of risk is one growing out of the contract of employment and extends only to the ordinary risks naturally and usually incident to the work that the employee has undertaken to perform, and does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties,' the opinion citing in approval *Yarborough v. Geer,* 171 N. C., 335; *Norris v. Holt-Morgan Mills,* 154 N. C., 474-485; *Pressly v. Yarn Mills,* 138 N. C., 410; *Hicks v. Mfg. Co.,* 138 N. C., 319-327.

"Even in those jurisdictions where a different concept of assumption of risk prevails, as exemplified in the decisions of the Federal courts construing the Employers' Liability Act, it is held that the position does not obtain in cases attributable to the employer's own negligent breach of duty unless the conditions thereby created are of an enduring kind or under circumstances that afford to the injured employees a fair opportunity to know of these conditions and appreciate the risks and

dangers which they present. *Gila Valley Ry. v. Hall,* 232 U. S., 94; *Jones v. R. R.,* 176 N. C., 260; *King v. R. R.,* 176 N. C., 300.

Under the principles stated and upheld in these and other like authorities there was no error to the defendant's prejudice, certainly, in referring to the jury the questions of negligence, contributory negligence, or assumption of risk. It was admitted on the argument for the defendant that the pinch-bar, the implement supplied by the company, was not fitted for stopping the car and that its use for that purpose threatened injury. The latter fact would seem to stand revealed from the evidence, and the injury having undoubtedly resulted, defendant's liability on the first issue was practically conceded, and on the second and third issues, the facts, showing that the car rolling down grade had already run over and crushed the plow point, which Fowler, the boss, had placed to stop the car at the proper position, presented a case of emergency, and the order of Fowler to plaintiff, standing by in position with the bar in his hand, and nothing else offered or available, "Scotch it, Sam; scotch it!" was one calling for instant obedience and was not unnaturally or unreasonably obeyed with the implement he then had. And these conditions having been presently created and in part influenced by the negligent order of the vice principal, affording to plaintiff no fair and reasonable opportunity to weigh or appreciate the danger attendant upon his act, there seems to be very little if any ground to support the defense either of contributory negligence or assumption of risk.

We find no reversible error in the record, and the judgment for plaintiff is affirmed.

No error.

FIDELITY BANK v. WYSONG & MILES COMPANY, INC.

(Filed 2 April, 1919.)

1. Evidence—Usury—Verdict—Agreement—Intent.

Where the evidence is conflicting, in an action upon notes given by a depositor to a bank, on the question as to whether there was an agreement between the plaintiff and defendant that the latter should keep, as a part of the consideration for the loan, an unchecking account of 20 per cent of the amount thereof, which would effect an usurious rate of interest, the verdict of the jury, under correct instructions, that the plaintiff did not knowingly take, receive, reserve or charge a rate greater than the legal rate, will be interpreted that there was no usurious agreement or unlawful intent, and judgment thereon in plaintiff's favor is a proper one. The law relating to usury discussed by *Walker, J.*

2. Appeal and Error—Instructions—Accord—Presumptions.

Where the charge of the trial judge is not set out in the record on

appeal, and no exceptions taken thereto, it will be presumed that it correctly charged the law applicable to the evidence of the case.

3. Appeal and Error—Evidence—Unanswered Questions.

Exceptions to the exclusion of questions asked a witness upon the trial of a cause will not be considered on appeal when it does not appear what the answer would have been or the character of the evidence excluded.

4. Appeal and Error—Courts—Discretion—Leading Questions.

The exclusion of leading questions is within the discretionary power of the trial judge, and not reviewable on appeal.

5. Appeal and Error—Technical Error—Prejudice—Harmless Error.

Technical error in excluding evidence on the trial of a cause is not reversible when it appears that it was not materially harmful to the appellant.

6. Principal and Agent—Evidence—Corporations—Officers.

Declarations of an agent made concerning matters within the scope of his authority, and which he was transacting for his principal at the time, are competent evidence against his principal, and this principle applies to corporations acting through its agents.

7. Evidence — Deceased Persons—Statutes—Corporations—Officers—Shareholders.

Our statute (Revisal, 1631), excluding as evidence, on the trial of an action, transactions or communications with deceased persons, etc., applies where the witness is a party to the action or claiming under a party thereto, or where he is testifying in his own behalf or in the behalf of a party succeeding to his title, or against the representative of a deceased person, or one deriving title through such person, or to transactions or communications between the witness and the person since deceased whose representative is a party to the action. Hence, where the action is between two corporations, an officer and shareholder of the plaintiff corporation may testify as to transactions or communications with the president and shareholder of the defendant corporation, since deceased, when otherwise competent.

ACTION tried before *Devin, J.*, and a jury, at September Term, 1918, of DURHAM.

The plaintiff alleged that the defendant corporation is indebted to it in the sum of $13,320, with interest as stated, being the balance due on the three notes, one of $1,000, another of $8,000, and the remaining one of $4,500, due ninety days after their respective dates, and given by defendant to it, for money loaned, in the months of March and April, 1918.

The defendant denied that any money had been loaned, but admitted the execution of the three notes, and alleged, as a counterclaim, that they had an agreement, under which it was to borrow of the plaintiff a large sum of money from time to time, but upon the condition, and as a part of the consideration for the loans, that the defendant should keep on deposit with the plaintiff bank a sum of money equal to 20 per cent

of the total amount of the loan as made to it, which should not be subject to check; or, in other words, the defendant borrowed the money and gave its three notes for the full amount of the loan, but received 20 per cent less than the amount of it or the same per cent less than the face value of the notes.

Defendant further alleged that it borrowed other money from the plaintiff bank, under a similar agreement as to the keeping of the 20 per cent of each loan on deposit with the bank, so that in all the defendant had borrowed and executed its notes for forty-five thousand dollars, and had received only thirty-six thousand dollars thereon, when the plaintiff applied the twenty per cent kept on deposit under the agreement, and amounting then to $3,700, to the indebtedness of the defendant. That during the entire course of these transactions, it further alleges, the interest on the respective loans, or the notes given therefor, was regularly paid by defendant at the rate of 6 per cent, and that "the requirement on the part of the plaintiff that the defendant should keep on deposit with the plaintiff 20 per cent of the amounts represented by the said notes was simply a scheme by which the plaintiff charged, reserved, and collected a greater rate of interest than that allowed by law." That under this scheme, which was devised for the purpose of exacting and receiving excessive and unlawful interest, under the guise of a fair and valid transaction, the defendant had paid to the plaintiff, and the latter has received, as usury, the sum of five thousand, two hundred and thirty-two dollars and fifty cents, and for this amount it demands judgment.

The plaintiff answered to the counterclaim and denied that it had received any excessive or unlawful interest from the defendant, or that it had agreed to do so, or to enter into any scheme or device for the purpose of reserving usurious interest in any form or manner, and specially that it required a deposit to be kept by defendant in its bank of 20 per cent of the loans or that it charged, reserved, or received interest, either directly or indirectly, on any amount which was really larger than that which was actually loaned. The defendant circumstantially denied all of the averments of the counterclaim as to the alleged usury.

There was evidence that when 20 per cent of a discounted loan is kept on deposit it amounts to 7½ per cent on the original indebtedness.

O. C. Wysong was former president of the defendant company. He is now dead.

Defendant asked Guy Branson, its own witness, this question: "Did Mr. Wysong, president of this company, while you were there, ever instruct you to maintain a balance of 20 per cent of the indebtedness of the Wysong & Miles Co. with the Fidelity Bank? Objection by

plaintiff. Objection sustained, and defendant excepted. By the court: Any declaration by the deceased president is incompetent and hearsay."

J. F. Wily, witness of plaintiff, testified that he was a stockholder and an active officer, as cashier, of the plaintiff bank at Durham, N. C. That he had a conversation with Mr. Wysong and agreed to refer the defendant's application for a loan to the directors of the plaintiff bank if defendant would send a statement of its financial condition and would give a satisfactory reference, and that after that the loan was made. The witness then testified that the balance of defendant's account with the bank varied, sometimes considerably below the 20 per cent level, and at other times above it; in July it dropped to $899, and at other times it was as low as $1,000, $1,200, $1,400, and $1,600, the defendant having the right to check on the deposit at will. This witness stated that the $3,700 was credited on defendant's note under its instructions, given by Mr. Wysong, who was its president. The latter evidence was objected to by defendant, and the objection was overruled. Defendant excepted. He then further testified that he had never heard of any usury agreement until this suit was brought, and that defendant ratified what was done by the plaintiff as to the $3,700 by giving the note for $1,300, which was the balance. The witness further testified as follows: "The account varied every day because they checked on us. There was nothing unusual about the account. The account has been practically dead since the time of the application of the $3,700, 6 May, 1914. The final statement shows a balance of thirty-three dollars and two cents. I have never objected to their drawing that out and did not know it was in the bank until we worked up this statement. . . . I have made demand for payment of the notes now due for $4,500, $1,000, and $7,820; total, $13,320. Mr. Wysong did not sign these notes, and I am asserting no claim against his estate. I am simply pressing these notes. They never made any suggestion of usury. We were requested to renew these notes, but refused. (Plaintiff here offers three notes in evidence as follows: 6 April, 1918, $4,450; 6 March, 1918, $1,000; 29 March, 1918, $7,820." Cross-examined, he said: "Mr. Wysong was endorser on the first notes, and I think on all the notes given up to the time of his death. I think he died last January. Up until the time Mr. Wysong died he was endorser on the notes." He did not endorse those now sued on.

Several letters of a correspondence between the parties were introduced by the defendant, the first letter, dated 10 January, 1912, asking for "a line of credit" and proposing to keep a 20 per cent balance of all discounted papers in the bank. This could not be answered, as Mr. Wiley, cashier of plaintiff bank, was about to leave Durham for a business trip, and he so wrote to defendant in a letter dated 10 January, 1912. In the third letter, dated 12 May, 1912, the defendant refers to

its having kept such a balance in another Durham bank, where it had an account, and stated that it was favorable to that bank as it averaged between 7¼ and 7½ per cent interest on the loans. This letter was answered by the plaintiff on 24 January, 1912, in which it said: "We beg to say that the matter mentioned in your letter has been considered, and it looks like we can accommodate you. If convenient, come down some day and talk it over, and in that way we can understand each other much better than by attempting to do so by correspondence." The other letters written in 1912 refer merely to a loan of $5,000. A letter of 6 May, 1914, refers to the application of the $3,700 to the note in the bank, which would leave a balance of $33.02. The letter of 6 May, 1914, also stated that Mr. Vaughn, who represented the defendant and was then in Durham, had assented to the suggested application of the $3,700 or, rather, had said it was the proper thing to do. The remaining letter, dated 23 May, 1917, asked for a detailed statement of defendant's account with the plaintiff so that it will show the balance on deposit subject to check; a list of defendant's notes discounted by the plaintiff, with face value dates, and maturity of the same, giving as a reason for making the request that defendant had just employed a new auditor who would post and balance its books for the closing fiscal year.

The jury, under the evidence (and the charge of the court, which is not in the record), rendered the following verdict:

1. Did the plaintiff knowingly take, receive, reserve, or charge a greater rate of interest than 6 per cent per annum on the notes set up in the complaint, or any notes of which the said notes set up in the complaint are renewals, as alleged in the answer? Answer: "No."

2. What amount, if any, is the defendant entitled to recover of the plaintiff on the counterclaim set up in the answer? No answer.

3. What amount, if any, is the plaintiff entitled to recover of the defendant? No answer.

Judgment was entered upon the verdict for the plaintiff and an appeal taken by the defendant.

Bryant & Brogden and Fuller, Reade & Fuller for plaintiff.
Jerome & Scales for defendant.

WALKER, J., after stating the case: The exceptions in this case, as will appear by reference to our statement of it, relate chiefly to the admission and exclusion of testimony. There is no exception to the charge, which is not set forth in the record, and we must, therefore, assume that it was correct in every respect and perfectly satisfactory to the appellant. *Muse v. Motor Co.,* 175 N. C., 466. We make brief reference to this fact because it makes it unnecessary for us to decide whether the trans-

action between the parties was usurious on its face or tainted *per se* with usury, if it were such as the defendant contends that it was, or if, in other words, the defendant has established his claim, that the 20 per cent of the discounted notes was left in the bank by it and held by the bank, without being subject to defendant's check, under an express agreement of the parties to that effect. As the charge is presumed to have been correct, we must conclude that the judge instructed the jury as to all phases of the case, and that they found under the evidence and charge either that there was no such agreement or, if there was such an agreement, the jury were instructed that it was not usurious on its face, and therefore they must find whether there was any actual intent to charge unlawful interest, and that, under the last instruction, they did find that there was no such intent. If they had found that there was an agreement, as claimed by the defendant, and the judge charged that it was usurious in law, they could not have answered the first issue "No" if they had followed the judge's instructions, which we assume that they did. So that, upon a fair and proper construction of the verdict, which should be read in the light of the evidence and what presumably was the charge (*Southerland v. Brown,* 176 N. C., 187; *Jones v. R. R.,* 176 N. C., 260), they either found that there was no such agreement or that there was no intent to violate the statute. We are of the opinion, though, that the jury found there was no agreement reserving unlawful interest, which of course would cut the defendant's case up by the roots, as the existence of such an unlawful agreement is the basic fact of his whole contention. In any aspect of the case, therefore, the question as to whether there was a transaction infected with usury is not before us, and will not be hereafter, unless there was some substantial error in the rulings upon the evidence, which we now proceed to consider; but as preliminary to this discussion we may state tentatively, and without being committed to them, a few general principles of the law concerning the main question and as they are found in books. The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the loan than is allowed by law. To sustain the defense of usury there must be satisfactory proof of some unlawful gain or advantage secured by the creditor. The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious. As above stated, it is not essential to usury that the contract to pay illegal interest should be absolute; the payment of the illegal interest may depend upon the happening of some contingent event, provided the principal is not put at hazard. Neither is it at all necessary that the parties shall have designated the usurious compensation as interest, *eo nomine.* If the money, property, or other thing of value agreed upon is intended as compensa-

tion for the use of the principal sum it is, as a matter of law, interest. Thus it has been held that an agreement for unlawful interest may, it seems, be inferred from an unexplained retention by the lender of a portion of the loan, the whole amount of which bears interest at the highest rate. Webb on Usury, sec. 28 and notes; 27 Am. and Eng. Enc. of Law, 925; citing *Cummins v. Wire,* 6 N. J. Eq., 73; *Andrews v. Poe,* 30 Md., 485; *MacKenzie v. Garnett,* 78 Ga., 251; *Uhifelder v. Carter,* 64 Ala., 527; *Vilas v. McBride,* 42 N. Y. St., 204; 17 N. Y. S. Rep., 171. And in another case it was said that where a person went to obtain discount at a bank voluntarily leaves a sum of money on deposit with the expectation that he will be thus enabled to obtain discount more readily, but without any understanding to not withdraw his money at any time, there is no usury. *Appleton v. Fiske,* 8 Allen (Mass.), 201. The following illustrations have been given: Where, in a State in which the legal rate of interest is 10 per cent, a municipal corporation attempts to satisfy a judgment against it by issuing warrants at the rate of one dollar in warrants for every seventy-five cents of the judgment, such warrants are void for usury. *Clark v. Des Moines,* 19 Iowa, 199. In determining whether usury exists in any particular case, the proper inquiry is not necessarily whether the borrower is to pay for the use or forbearance but *what is the lender to receive* for the loan or forbearance of his money. Where the entire gain of the lender is derived from the borrower, the profit to the former and the cost to the latter are commensurate; but where there are intervening sources of profit to the lender or expense to the borrower, the proposition stated in the last preceding sentence may have application. Webb on Usury, page 30 and notes. In *Eringhaus v. Ford,* 25 N. C., 522, where a bank of this State agreed to lend to an individual notes of a Virginia bank, which were at a depreciation in the market, below both specie and the notes of the bank of this State, and the borrower was to give his note at ninety days, to be discounted by the bank, and to be paid in specie or in the notes of the bank making the loan, it was held that the note given in pursuance of this agreement was void for usury, though the borrower stated at the time that he could make the Virginia notes answer his purpose in the payment of his debts to another. Usury consists in the unlawful gain, beyond the rate of 6 per cent, taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower. The proper subject of inquiry is, what is the lender to receive, and not always what the borrower is to pay, for the forbearance. It is generally true that to constitute usury there must be an agreement between the lender and the borrower by which the latter pays or promises to pay and the former knowingly receives or secures a higher rate of interest than is allowed by the statute. Webb on Usury,

p. 30, sec. 30. As to the practice and procedure, it has been said that in all cases the purpose should be to ascertain the intention of the parties. The intent may be construed by the law upon the face of the usurious contract, as we have clearly shown, or it may be proved as a fact. Since, therefore, the question of usury may depend sometimes upon the purpose and intent of the parties, it follows that usury may be a question of law or fact, or a mixed question of both law and fact. There cannot be usury without facts; and those facts, which may include the actual intent, when they are controverted, must be tried and ascertained by the jury. Whether upon those facts the transaction be usurious is a question of law which addresses itself alone to the court. But the question of unlawful interest is commonly one for the jury, where it does not follow as a clear deduction from undisputed facts, or is not imputed by the mere construction by the court of a written instrument, unaided by extrinsic evidence, when it becomes a question of law to be determined by the court. The latter is the case where the contract on its face and by its own terms *per se* imports usury. Webb on Usury, sec. 434; *Lynchburg v. Norvell,* 20 Gratton, 601; *Smith v. Hathorn,* 88 N. Y., 211; *Walker v. Bank of Washington,* 44 U. S., 61; *Levy v. Gadsby,* 3 Cranch (U. S.), 80; *Banning v. Hall,* 72 N. W. Rep. (Minn.), 817; *Woolsey v. Jones,* 84 Ala., 88. But we need not decide these questions as they are not directly involved, and merely refer to them incidentally as they serve to throw some light upon the other questions which are presented for decision. They will all be found fully treated in Webb on Usury, secs. 27 to 41, pp. 27 to 31, and secs. 454, 455, pp. 500 and 501, and cases in the notes. See, also, *Grant v. Morris,* 81 N. C., 150; *Burwell v. Burgwyn,* 100 N. C., 389; *Bennett v. Best,* 142 N. C., 168; *Yarborough v. Hughes,* 139 N. C., 199; *Miller v. Ins. Co.,* 118 N. C., 612; *Meroney v. B. and L. Asso.,* 116 N. C., 882; *Arrington v. Goodrich,* 95 N. C., 462. This brings us to the rulings on evidence.

1. The objection, based upon the exclusion of the question addressed to the witness Guy Branson, as to instructions from Mr. Wysong, cannot be sustained for several reasons, one of which is that it does not appear what answer he would have given. *Jenkins v. Long,* 170 N. C., 269; *Rawls v. R. R.,* 172 N. C., 211; *Smith v. Comrs.,* 176 N. C., 466. He might have answered "No," in which case the defendant would have proved nothing. If we should hold this ruling to be error, and reverse, when the witness is called at the next trial he may answer "No," and we will have been at great pains to decide a matter utterly immaterial. The question also was leading, and it was discretionary with the court whether it should be excluded. *S. v. Price,* 158 N. C., 641; *McKeel v. Holleman,* 163 N. C., 132; *S. v. Williams,* 168 N. C., 191. The defendant's witness, J. R. Brown, testified four times, and without objection,

that a 20 per cent deposit was required at all times, though we do not place our decision on this ground. It merely goes to show that defendant was not materially harmed, even if the ruling was technically erroneous. The witness, J. R. Brown, testified at least three times, under cross-examination, to the instructions from Wysong as to the 20 per cent deposit without any protest from the plaintiff. It would seem, therefore, that the fact was not seriously contested, and if so, no real harm was done by the judge's ruling, *Weathersbee v. Goodwin,* 175 N. C., 234; and we would be slow to reverse unless it was reasonably clear that the ruling was prejudicial. *Weathersbee case, supra; S. v. Davis,* 175 N. C., 723, 729; *Goins v. Indian Tr. School,* 169 N. C., 737; *Elliott v. Smith,* 173 N. C., 265; *Mitchell v. Bottling Co.,* 174 N. C., 771.

We need not, therefore, consider whether the order given by Wysong to the witnesses, J. R. Brown and Guy Branson, and testified to by them, should be regarded as a self-serving declaration by Wysong, as contended by the plaintiff. They swore to the fact of retaining the 20 per cent, and it is claimed by defendant to be, therefore, competent for them to state that it was done under an order given at the same time, which was *pars res gestæ* as qualifying or explaining their act. Jones on Ev., sec. 346. But however this may be, the result will be the same, in the view we take of the case.

2. As to the testimony of John F. Wiley, plaintiff's cashier, relating to conversations with O. C. Wysong, defendant's former president, who is dead. A corporation can act only through its agents, and it is competent to prove the agent's declaration as against the principal, when it was made about matters within the scope of his authority and relates to the transaction in which he was then engaged on behalf of the principal. *Gwaltney v. Assurance Society,* 132 N. C., 925; *Walker v. Cooper,* 159 N. C., 536; *Molyneux v. Huey,* 81 N. C., 106; *Roberts v. R. R.,* 109 N. C., 670; *Sprague v. Bond,* 113 N. C., 551 (557). Mr. Wysong was acting as defendant's agent throughout the transaction, and was its leading officer. The evidence, therefore, falls within the principle just stated. But the defendant's objection is mainly founded upon another ground, that the conversations between the two officers, one of them Mr. Wysong, the defendant's agent, being dead, is forbidden by Revisal of 1905, sec. 1631. We do not think so. A slight examination of the clear and excellent analysis of that section (Code of 1883, sec. 589), made by the present Chief Justice in *Bunn v. Todd,* 107 N. C., 266, will show that no such case is presented as will exclude John F. Wiley as a witness or render his testimony incompetent. Mr. Wiley is not a party to the action, nor did he claim through or under any one who is a party. He did not testify in behalf of himself or in behalf of any party succeeding to his title, for he had none, but solely as a witness

for the plaintiff; nor did he testify against the representative of a deceased person, or against any person deriving his interest through such person, nor as to any personal transaction or communication between the witness and the person since deceased, whose representative is a party to the action. The exception to this rule of exclusion stated in *Bunn v. Todd, supra,* does not apply to the facts of this case. That the suit must be prosecuted against the representative of a deceased person, which is the capital requirement of the section, has no application here as this is not that kind of a suit, there being no representative of a deceased person as defendant, or even as plaintiff. There is nothing but the bare fact that Mr. Wiley had an interest as stockholder in the plaintiff bank, and was one of its officers, and Mr. Wysong had an interest in the defendant corporation and was one of its officers. But this does not bring the testimony admitted by the court within the prohibition of section 1631. It may be that the section should be broadened so as to include such a case, but that must be done by legislation and not by our construction. If it would be wise and fair for this change to be made, the Legislature which declares the policy of the State must say so as it makes the law, and we merely declare what it is. This case is not within the spirit of the section, and certainly not within its letter. *Bunn v. Todd, supra,* has frequently been approved since it was decided, the two most recent cases which expressly endorse its statement of the rule and apply it being *Brown v. Adams,* 174 N. C., 490, and *Pope v. Pope,* 176 N. C., 283. Mr. Wysong was not a party to the last notes of the series of renewals, which are now sued on, nor is his estate sought to be charged with any liability in this action through his personal or legal representatives. As no claim was being or could be asserted in this action against the estate of Mr. Wysong or his representatives, and as the defendant derived no title or interest through or under him, Mr. Wiley's testimony did not relate to such a personal transaction or communication with a deceased person, as is forbidden by section 1631 of the Revisal. *Roberts v. R. R.,* 109 N. C., 670; *Sprague v. Bond,* 113 N. C., 551 (557); *Gwaltney v. Assur. Soc.,* 132 N. C., 925, *supra.* Wysong's estate will not be affected in law by the event of this action, although he may have been an endorser on some of the renewals given prior to the notes in suit, and if he had such a vague, indirect and eventual interest the suit is not against Mr. Wysong's representatives, and the witness was not, therefore, testifying against the latter within the meaning of the statute, but only against the defendant, which is an incorporated company.

We do not see how Mr. Wysong derived any interest in this suit under the defendant, as was argued, and if he had any personal interest in the transaction it is not represented by his administrator in this action.

There are other answers to the contention which need not be stated.

It results that there is no error in the record, and it must be so certified.

No error.

R. C. SHARPE AND WIFE v. N. W. BROWN.

(Filed 9 April, 1919.)

Estates—Conditional Fee—Statutes—Fee Tail—Absolute Fee—Deeds and Conveyances—Intent.

In consideration of natural love and affection and of one dollar, and for her "maintenance and preferment," the donor of lands conveyed them to his granddaughter "and to the heirs of her own body; if she never has heirs of her own body, then in that event she never has any" over to certain designated persons and their children, the granddaughter at the time of the conveyance being a child, but since grown up with a child by marriage: *Held*, (1) at common law the gift to the granddaughter was a conditional fee which became absolute upon the happening of the condition, the birth of the child; (2) the conditional fee is converted into an estate tail under the statute of De Donis (13 Edw., 1), and into a fee simple absolute title under our statute, Rev., sec. 1578; (3) construing the words "heirs of her own body" to mean the donee's children, there being no child born at the execution of the deed and no intermediate estate, and the deed having been executed since 1879 (Rev., sec. 946), without words of inheritance, the conveyance would be to the granddaughter in fee upon the birth of the child by the marriage; (3) the intent of the donor, appearing by the proper construction of the deed, would be to give the fee-simple estate to the grand-child upon the birth of her child by marriage.

APPEAL by defendant from *Devin, J.*, at the December Term, 1918, of ORANGE.

This is an action to recover the purchase price of a certain tract of land, the plaintiffs having tendered to the defendant a deed pursuant to a contract of purchase and the defendant having refused to accept the same upon the ground that the palintiffs have not an indefeasible title in fee.

The plaintiffs derive their title under a deed from Manly D. Stroud and wife, Martha Stroud, of date 30 December, 1893, which conveys the land described in the complaint upon the following considerations and conditions:

"For and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of the natural love and affection which we, the said Manly D. Stroud and his wife, Martha Stroud, hath and beareth towards our granddaughter,

Margaret Wellons Stroud, and for other divers good causes and reasons we hereunto moving, and for the better maintenance and preferment, and by these presents hath given, granted, and by these presents do give, grant, and convey unto our granddaughter, Margaret Wellons Stroud, and to the heirs of her own body; if she never have any heirs of her own body, then in that event she never does have any, then it is to go to M. M. Stroud and T. W. Stroud their life, and then to their children."

Margaret Wellons Stroud intermarried with R. C. Sharpe on 1 June, 1915, and she and the said Sharpe are the plaintiffs in this action. A child was born of said marriage on 10 August, 1917, and is now living.

His Honor held that the plaintiffs could convey an indefeasible title to the defendant, and rendered judgment in favor of the plaintiffs, and the defendant excepted and appealed.

S. M. Gattis attorney for plaintiffs.
No counsel for defendant.

ALLEN, J. The deed before us, while similar in some respects, does not have its counterpart in any to be found in our Reports and in the absence of controlling authority we must have recourse to the principles of the common law, as "these things, though they may seem ancient, are necessarie notwithstanding to be knowne." *Coke.*

It must be noted that the grantors do not purport to convey the land in controversy to their granddaughter for life, and then or after her death to the heirs of her body, nor is the limitation over to M. M. and T. W. Stroud in the event of death leaving no heirs of her body, or leaving none surviving her, nor is a similar expression used, illustrations of which may be frequently found in the decided cases.

The conveyance is to "Margaret Wellons Stroud and to the heirs of her own body, if she never have any heirs of her own body, then in that event she never does have any, then it is to go to M. M. Stroud and T. W. Stroud their life, and then to their children."

At common law a grant to one and the heirs of his own body was an estate upon condition, called a fee conditional, which left in the grantor the right to reenter, upon failure to have heirs of the body, as upon a condition broken.

"But the general propensity which then prevailed to favor a liberty of alienation induced the courts of justice to construe limitations of this kind in a very liberal manner. Instead of declaring that these estates were descendible to those heirs only who were particularly described in the grant, according to the manifest intention of the donors and the

strict principles of the feudal law, and that the donees should not in any case be enabled by their alienation to defeat the succession of those who were mentioned in the gift or the donor's right of reverter, they had recourse to an ingenious device taken from the nature of a condition.

"Now it is a maxim of the common law that when a condition is once performed it is henceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. The judge's reasoning upon this ground determined that these estates were *conditional fees,* that is, were granted to a man and the heirs of his body, upon condition that he had such heirs; therefore as soon as the donee of an estate of this kind had issue born, his estate became absolute by the performance of the condition, at least for these three purposes: 1. To enable him to alien the land," etc. 1 Greenl. R. P., Title 2, ch. 1, secs. 4 and 5.

In consequence of this construction, which prevented the perpetuation of lands in one family, which was the purpose of the creation of the estate, the statute *de bonis* (13 Edw., 1) was adopted, which converted the fee conditional into a fee tail, which is described as "a particular estate in the donee, called an estate tail, subject to which the reversion in fee remained in the donor," and this estate was one "of inheritance in the donee and some particular heirs of his body to whom it must descend, notwithstanding any act of the ancestor." 1 Greenl. R. P., pp. 78 and 79.

This brief outline of the estates, which is substantially as stated in 1 Co. Litt., 19a, and Mod. Am. L., V. 5, p. 66 *et seq.,* shows that a fee conditional was created at common law, and a fee tail under the statute *de bonis* when the estate was granted to one and the heirs of his own body, with reversion to the grantor upon failure of such heirs, and this is the legal effect of the deed before us.

The estate is conveyed to "Margaret Wellons Stroud and to the heirs of her own body," which is clearly a fee tail, and the succeeding words, "if she never have any heirs of her own body then in that event she never does have any," merely gives verbal expression to the condition which would give rise to the operation of the reversion in the grantor, without these words as matter of law, and is no more than the law would declare if not expressed; and the further limitation to M. M. Stroud and T. W. Stroud is an attempt to pass the reversion after the conveyance of the fee tail, but estates in tail having been converted by our statute into a fee simple and the reversion thereby cut off, nothing passed to them.

In other words, if the deed had stopped at a conveyance to "Margaret Wellons Stroud and to the heirs of her own body," a reversion would

have remained in the grantor to be enjoyed upon failure of such heirs, and which under our law he could convey to M. M. and T. W. Stroud (*Kornegay v. Miller,* 137 N. C., 664); and if this is true, the construction cannot be changed because the parties saw fit to incorporate these terms in the deed.

It follows that Margaret Wellons Stroud took a fee tail under the language of the deed, and as this estate has been converted into a fee simple under our statute (Rev., sec. 1578) she has the right to convey an estate in fee.

There are several cases in our Reports, prior to the act of 1827 (Rev., sec. 1581), which give this construction to devises, in which the language was much more favorable to the contention of the defendant than that used in the present deed, and the statute has no bearing because the limitation over is not contingent "upon the dying of any person without heirs or heirs of the body, etc.," but upon having an heir of her body, which was met upon the birth of a child, under the authority of *Bank v. Murray,* 175 N. C., 64, in which it was held that in a devise to a son, and "should he not marry or even marry and have no issue," then over, that the condition was performed and the estate absolute upon marriage and birth of issue without regard to the time of the death of the son.

In *Sanders v. Hyatt,* 8 N. C., 247, "Devise to A., and if he dies without any lawful begotten heir of his body, then to his brother and sisters: *Held,* that the devise to A. is of an estate tail which, by the act of 1784, is converted into a fee simple, and the ulterior limitation is therefore void."

In *Ross v. Toms,* 15 N. C., 376, it was held that "A devise of lands to A. for life and after her death to be equally divided among the male or female heirs begotten of her body, and for want of such heirs, then over, gives A. an estate tail in the land, which by the act of 1784 (Rev., ch. 204) is converted into a fee."

In *Hollowell v. Kornegay,* 29 N. C., 261, "A., by will in 1786, devised to his son R. a tract of land and then proceeded as follows: 'And my desire is, if my son R. die without heir lawfully begotten of his body for it to be sold and equally divided between his own sisters': *Held,* that the limitation over was too remote, and that estates tail having by the act of 1784 been converted into fee-simple estate, the son R. took an absolute estate in fee simple in the land devised."

In the last case, *Ruffin, C. J.,* after citing *Sanders v. Hyatt* and noting the difference in the language, says: "But that difference is entirely immaterial, as in each case the disposition over is after the death of the first taker 'without heir lawfully begotten of his body,' that is, of a re-

mainder after an estate tail in possession, which the act of '84 makes void. The fee vested in Richard, and is now in the defendant."

Another and simpler method of reaching the same result is that the conveyance to the granddaughter and the heirs of her own body passed an estate in fee tail, which by our statute was converted into a fee simple, defeasible if no child was born to her, but which became absolute upon the birth of a child, who was an heir of her body as the term is generally understood, although not technically so, because of the rule that no one can be heir to the living.

If, however, we construed the words "to the heirs of her own body," wherever they appear, to mean children, so that the deed would read "unto our granddaughter, Margaret Wellons Stroud, and to her children, if she never have any children then in that event she never does have any," we would reach the same conclusion, because there being no child born at the time of the execution of the deed and no intermediate estate, after-born children could not take (*Powell v. Powell,* 168 N. C., 561), and the conveyance would be to the granddaughter alone, which would be in fee, without words of inheritance, because the deed bears date since the act of 1879 (Rev., sec. 946), but defeasible if no child was born, and absolute when a child was born, under the *Murray case,* which event has taken place.

We therefore conclude, in any view of the case, the plaintiffs can convey a good title to the defendant, and this carries out and gives effect to the intent of the grantors, manifest on the face of the deed, which was executed twenty-two years before the marriage of the granddaughter, when she was a small child, in consideration "of natural love and affection for her better maintenance and preferment," the grantors having in mind that she might not reach womanhood, but desiring, if she did so and married, her estate should be absolute upon the birth of a child.

Affirmed.

BRISTOL GROCERY COMPANY v. W. BAILS ET ALS.

(Filed 9 April, 1919.)

1. Partnership—Husband and Wife—Married Women—Exemptions—Statutes—Constitutional Law.

Under the provisions of Article X, section 1 of our Constitution, and the Martin Act, ch. 109, Laws 1911, making a married woman liable for her contracts, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of Revisal, sec. 2107, and each has consented that such exemption should be allowed to the other therefrom.

2. Married Women — Husband and Wife—Statutes—Certificates—Signs—Exemptions—Constitutional Law.

The failure of a married woman to comply with the provisions of Revisal, sec. 2118, and ch. 77, Laws 1913, as to filing a certificate with the clerk of the court and displaying her name at the place of business conducted by her, does not deprive her of her constitutional right (Art. X, sec. 1) of having her personal property exemption out of the assets of the business.

APPEAL by plaintiffs from *Lane, J.*, at July Term, 1918, of ASHE.

The defendant, W. Bails, was a general merchant and purchased goods from the plaintiffs. Later, W. Bails and his wife, Essie Lee Bails, made an assignment for benefit of creditors, alleging that they were partners in the mercantile business, and each of them claiming their personal property exemption. The plaintiffs brought an action attacking the deed of assignment for fraud on the part of W. Bails in the purchase of the goods and contesting the right of Essie Lee Bails to exemption, and charging that J. E. Shumate was a partner, and asking judgment against him. The jury found as a fact that she was a partner in the business and that J. E. Shumate was not. Judgment upon the verdict allowing the personal property exemption to the wife, and appeal by the plaintiffs.

J. B. Councill and G. L. Park for plaintiffs.
T. C. Bowie and R. A. Doughton for defendant.

CLARK, C. J. The only point presented in the argument in this Court was as to the correctness of the judgment permitting Essie Lee Bails to have her personal property exemption allotted.

The right to the homestead and personal exemption is guaranteed to "every resident" by the Constitution. The liability of the wife on her contracts has been settled ever since the statute which provided "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried." Chapter 109, Laws 1911; *Lipinsky v. Revelle,* 167 N. C., 508; *Bowen v. Daugherty,* 168 N. C., 242; *Royal v. Southerland, Ib.,* 406, 407; *Warren v. Dail,* 170 N. C., 410; *Thrash v. Ould,* 172 N. C., 730. The wife, therefore, has been held, ever since, liable jointly and severally whenever a partner or a surety. There is no question arising here between husband and wife as to the validity of the contract of partnership as between them under Rev., 2107, nor as to title derived from them. But they each admit the partnership and assent to the other asserting the claim to exemption as a partner. *Scott v. Kenan,* 94 N. C., 300; *Richardson v. Redd,* 118 N. C., 677. The jury

have found as a fact that such partnership existed, and the Constitution decrees, Art. X, sec. 1, that "the personal property of *any resident* of this State to the value of $500" shall be exempt from execution.

It was held, even prior to the Martin Act of 1911, that on a judgment against the wife she is entitled to her personal property exemption. *Harvey v. Johnson,* 133 N. C., 353. There are other parts of that decision which do not obtain since the passage of the "Martin Act."

The plaintiffs contend that Essie Lee Bails had failed to comply with Rev., 2118, and ch. 77, Laws 1913, as to filing a certificate with the clerk of the Superior Court and displaying her name at the place of business, and therefore that she could not be a partner in the business and hence not entitled to her legal exemption. Rev., 2118, fixes as a penalty for the violation of that section that the married woman shall be deemed a free trader and shall be liable for her debts but does not attempt to deprive her of her rights to her personal property exemption. Indeed, such right to an exemption being guaranteed by the Constitution is not forfeited even by a fraudulent conveyance. *Crummen v. Bennett,* 68 N. C., 494; *Arnold v. Estes,* 92 N. C., 162; *Rankin v. Shaw,* 94 N. C., 405; *Dortch v. Benton,* 98 N. C., 190; *Rose v. Bryan,* 157 N. C., 173.

Stone v. McLamb, 153 N. C., 378, holding a married woman liable as a free trader formerly in such cases, is applicable to all married women under the "Martin Act," but does not deprive her of her constitutional exemption.

On the findings of the jury, Essie Lee Bails was a partner in the business, was liable for all its debts, and is entitled to her constitutional exemptions against an execution upon the judgment rendered against her.

No error.

W. M. McINTYRE v. T. J. MURPHY, *Manager,* ET ALS.

(Filed 15 April, 1919.)

Cities and Towns — Ordinances — Statutes — Meat Market — Discretionary Powers—Courts.

An ordinance of a city providing, among other things, that no permit shall issue for conducting a meat market therein unless the city manager is satisfied that the applicant is of good moral character, and that the business shall be conducted in such manner as not to create a nuisance, passed in pursuance of its charter authorizing the city to exact and enforce all ordinances necessary to protect the health, life, and property of its inhabitants, is valid, and where the manager has refused an applicant for a meat market at a certain location and the city council has

passed thereon in pursuance of the ordinance, with approval, the courts will not set it aside and order a reconsideration where the discretion conferred has not been capriciously or arbitrarily exercised. Where the character and efficiency of the applicant is unquestioned, objection that the business itself not being a nuisance, the license should have been granted, is untenable, for to conduct it at the place selected might create one on account of its environment, which is a matter left to the discretion of the proper city authorities.

APPEAL by plaintiff from *Adams, J.*, at May Term, 1918, of GUILFORD.

This is an action against the city manager and city council of High Point for a *mandamus* to require the issuance to the plaintiff of a license to operate a meat market upon the payment of the amount required in the ordinances for such licenses, at No. 115 on South Main Street in said town. The judge found the facts as set out in the record and refused to order the license to issue. Appeal by plaintiff.

T. J. Gold, W. P. Bynum, and R. C. Strudwick for plaintiff.
Dred Peacock for defendants.

CLARK, C. J. The plaintiff applied to the defendant Murphy, the city manager, for license to conduct a meat market at No. 115 South Main Street, in High Point. A petition against the grant of said license was filed by seventy-six citizens of the town, and the city manager referred the application to the city council as authorized by the city ordinance. The judge finds as a fact that the city council at a meeting regularly and duly held, and after hearing the evidence, refused to grant the license. The judge finds that the plaintiff is a man of good moral character, and is an experienced and efficient market man. The city council refused the license under the provisions of section 6 of the ordinances, which provides that no license shall issue to engage in any trade or business mentioned in that section if the applicant does not possess a good moral character or if the business will be a nuisance. The council evidently found the latter point against the applicant.

The court further found as a fact that "Neither the city manager nor the city council acted arbitrarily or in abuse of the discretion vested in them as officers of said city." There was evidence in the record supporting such finding.

The judge held properly, as a conclusion of law, that the city manager and city council were vested with the sound legal discretion to grant or refuse the license applied for, and that having refused in the exercise of such discretion to issue a license to the plaintiff to conduct a meat market at the point desired by him, the court, in the absence of evidence of arbitrariness, would not compel them to issue the license.

The charter of High Point, Laws 1909, ch. 395, sec. 5, authorized that town to enact and enforce all ordinances necessary to protect the health, life, and property of the inhabitants of that city, not inconsistent with the laws of the State. The ordinances vested the power to grant or refuse licenses for the purpose asked by the plaintiffs in the city manager, with authority to refer an application in case of doubt to the city council.

The granting or refusing license to retail meats is an exercise of the police power of the city. *S. v. Bean,* 91 N. C., 554. While there must be no arbitrary discrimination in the exercise of such power, the city is authorized to say where the market may be located, having due regard to the appropriateness of the locality and whether or not it would be a nuisance at the point desired. *Hutchins v. Durham,* 118 N. C., 457. The city would also be authorized to reject an application if the party was not of good character or was inefficient for the business, but no question of that kind occurs in this case.

The plaintiff places his appeal chiefly upon the ground that ordinance 6 provides that no permit shall issue unless the city manager is satisfied that the applicant is of good moral character and that the business will be conducted in such a manner as not to create a nuisance, and contends that as the plaintiff is a man of good character and the business is legitimate that it cannot be conducted as a nuisance. This is erroneous, for the city council found, upon the protest of a large number of citizens, that the location of the meat market in the very heart of the retail business district of the city would be a nuisance notwithstanding the good character of the applicant and the necessary nature of the business.

While the courts will compel an officer to exercise his discretion in passing upon an application, or if his action is found to be capricious or arbitrary the court will set his action aside and require a reconsideration, it will not direct that the city authorities shall locate a market at any designated point which will be a nuisance. That would be to substitute the courts for the duly elected authorities of the city.

Upon the findings of Judge Adams, the *mandamus* was properly refused.

Affirmed.

N. L. H. WILLIAMSON v. F. C. AND J. C. RABON.

(Filed 15 April, 1919.)

1. Deeds and Conveyances—Mortgages—Trusts and Trustees—Parol Trusts—Evidence—Allegations—Fraud—Mistake—Redemption Clause.

For the courts to declare a deed to lands, absolute in terms, and conveying the fee-simple title, a mortgage of the grantor therein for the

security of a debt or obligation, it is necessary that there be allegation and proof that the clause of redemption was omitted therefrom by reason of ignorance, mistake, fraud, or undue advantage, and parol evidence is incompetent to establish a parol trust in the grantor's favor. *Newton v. Clark*, 174 N. C., 393, cited and applied.

2. Pleadings — Allegations — Cause of Action—Defective Statement—Evidence.

Where there is neither allegation nor proof that a deed to land, absolute on its face, sought to be declared a mortgage, had the redemption clause omitted upon grounds sufficient for the purpose, the action is one where a fact, essential to support a judgment in plaintiff's favor, is entirely lacking, rendering inapplicable the principle that a defective statement of a cause of action may be supplemented or cured.

3. Courts—Stare Decisis—Opinions—Decisions—Vested Rights—Statutes—Common Law.

While the doctrine of *stare decisis* or the adherence to judicial precedents is fully established, and will continue to be upheld in proper instances by our courts, and a single decision may become a precedent sufficiently authoritative to protect rights acquired during its continuance, its occurrence is more frequently in relation to the construction of statutes formally made by courts of last resort, thereafter considered as a part of the statute itself; and for this effect to be given to decisions declaratory of the common law or of general equitable principles, it is more usually required that there be a series of like decisions on a given subject, or, if one, that it is so definite in its terms and so generally acquiesced in and acted on that it has come to be recognized as an accepted rule on a given question.

4. Same—Rule of Property—Deeds and Conveyances—Mortgages—Public Policy.

The erroneous principle announced in *Fuller v. Jenkins*, 130 N. C., 130, that a deed absolute in form may be changed into a mortgage by reason of a contemporaneous parol agreement to that effect, without allegation or proof in the suit brought for that purpose, that the clause of redemption was omitted by mistake or fraud, etc., affords no basis for the application of the principle of *stare decisis* or recognition of a fixed rule of law under which rights may be acquired, it being soon overruled and standing alone, and in direct antagonism to the laws of this State as established by a current of decisions from the early times of the Court, and contrary to the rule of our system of jurisprudence maintaining the stability of titles and the security of investments and sound public policy which forms the basis of the doctrine relied upon.

ACTION tried before *Lyon, J.*, and a jury, at February Term, 1918, of COLUMBUS.

The action is to have a written deed for two tracts of land from plaintiff to defendant, absolute in terms and for value, declared and dealt with as a mortgage to secure about $2,000, with accrued interest, exact amount indefinite, on allegation and proof tending to show that at the time the deed was executed there was a parol agreement between the

parties that the same should stand as mortgage to secure said amount and plaintiff should have as much as three years to redeem same.

There was denial of the agreement by the defendant with averment and proof tending to show that the deed was absolute in term for a full and valuable consideration paid to the plaintiff.

On issues submitted the jury rendered the following verdict:

1. Did the defendants procure the deed, dated 6 January, 1915, in form a fee simple, upon the promise that plaintiff should have the right to redeem the land therein described upon payment of money advanced for plaintiff? Answer: "Yes."

If so, what is amount of debt due by plaintiff to defendants to secure the land in controversy? Answer: "$2,862, with interest from 6 January, 1915."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

McLean, Varser & McLean and Lewis & Powell for plaintiffs.
Irvin B. Tucker and H. L. Lyon for defendants.

HOKE, J. It is the law of this State that "a written deed, absolute in terms, cannot be changed into a mortgage except upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." This position was approved and confirmed in the recent case of *Newton v. Clark,* 174 N. C., 393, and it was there further held that "Parol evidence that a deed to lands was made on an agreement to reconvey the same to the grantor on a certain contingency is incompetent to establish parol trust in the grantor's favor," etc., citing a long line of authorities in support of both positions. The opinion then quotes with approval from *Pearson, J.,* in *Sowell v. Barrett,* 45 N. C., 54, as follows: "Since the case of *Streator v. Jones,* 10 N. C., 433, there has been a uniform current of decisions by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt: (1) It must be alleged, and of course proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; (2) the intention must be established, not merely by proof of declarations, but by proof of facts and circumstances, *de hors* the deed, inconsistent with the idea of an absolute purchase. Otherwise titles evidenced by solemn deeds would be at all times exposed to the 'slippery memory of witnesses,'" and proceeds, "These principles are fully discussed in *Kelly v. Bryan,* 6 Ire. Eq., 283, and it is useless to elaborate them again. This excerpt from the opinion has been quoted literally and with approval in *Bonham v. Craig,* 80 N. C., 224; *Watkins v. Williams,* 123

N. C., 170; *Porter v. White,* 128 N. C., 43, and the same principle is declared in different language in *Kelly v. Bryan,* 41 N. C., 286; *Brown v. Carson,* 45 N. C., 272; *Briant v. Corpening,* 62 N. C., 325; *Edgerton v. Jones,* 102 N. C., 283; *Norris v. McLam,* 104 N. C., 160; *Sprague v. Bond,* 115 N. C., 532." And, in negation of the right to establish a parol trust in favor of the grantor, cites *Gaylord v. Gaylord,* 150 N. C., 228.

It is nowhere alleged in the pleadings that the clause of redemption was omitted by mistake, nor do we find that any proof was offered to that effect nor is it established by the verdict. This is not a case then of a defective statement of a cause of action which has been in any way supplemented or cured but the case presented is one where a fact, essential to support a judgment in plaintiff's favor, is entirely lacking and the same must therefore be set aside. *Warlick v. Plonk,* 103 N. C., 81; *Emery and Wife v. R. R.,* 102 N. C., 209. In the latter case the principle is stated as follows: "The verdict, whether in response to one or many issues, must establish facts sufficient to enable a court to proceed to judgment." We were referred by counsel for plaintiff to the case of *Fuller v. Jenkins,* 130 N. C., 554, as an authority to the effect that a deed, absolute in form, may be changed into a mortgage by reason of a cotemporaneous parol agreement to that effect and without allegation or proof that the clause of redemption was omitted by mistake or fraud, etc., and it is insisted that the principle of *stare decisis* may be invoked in support of the present proceedings and in protection of the rights and interests arising to plaintiff while that case expressed the ruling of the Supreme Court on the question presented. The doctrine of *stare decisis* or the principle of adherence to judicial precedents is fully established in this State, and in proper instances will continue to be steadfastly upheld. *Mason v. Cotton Co.,* 148 N. C., 492, and *Hill v. R. R.,* 143 N. C., 539. The position recognized in *Fuller v. Jenkins* having been entirely disapproved in the later case of *Newton v. Clark, supra,* the doctrine is not in strictness presented by the record, and the question recurs on the effect to be allowed the case of *Fuller v. Jenkins* as a precedent in support of the interest which plaintiff is here endeavoring to assert. While a single decision may become a precedent sufficiently authoritative to protect rights acquired during its continuance, such a case more frequently occurs in the construction of statutes applicable, in which case an authoritative interpretation, formally made by a court of last resort, is thereafter considered a part of the law itself and may be invoked to protect titles acquired and investments made on the faith of the principle so recognized and declared. In decisions, however, declaratory of the common law or of general equitable principles, in order to establishment of such a precedent, it is more usually required

that there be a series of decisions on a given subject, or if one, that it be so definitive in its terms and so generally acquiesced in and acted on that it has come to be recognized as the accepted rule on a given question.

It is said that a Supreme Court decision in that class of cases does not constitute the law but is only evidence of it, and the general rule is that when a court of last resort has felt called on to overrule such a decision it is not thereafter considered bad law but as never having been the law applicable in such case.

Mason v. Cotton Co., supra, and authorities cited; Ram on Judgments, ch. 3, p. 47, and the question of how far it should serve to protect intervening rights, is largely in the discretion of the court that rendered it. Black on the Law of Judicial Precedents, p. 187; dependent on the character of the decision itself, that is, whether it is sufficiently definitive and purports to establish a given principle; the nature of the right for which protection is claimed and whether it was considered and reasonably relied upon in the case presented, and how far a sound public policy is involved and must be allowed to affect the question. The principle appearing in *Fuller v. Jenkins* is in direct antagonism to the law of this State, as established by a current of decisions, well nigh from the beginning of the Court, certainly as far back as *Streator v. Jones,* 10 N. C., 433, in 1824, one of them, *Porter v. White,* 128 N. C., 42, just one year prior to the case in question and fully reaffirmed in the later decision of *Newton v. Clark, supra;* all holding that in order to change a deed into a mortgage it must be alleged and proved that the clause of redemption was omitted by mistake, etc. The case does not, in terms, purport to lay down any definite or different principle nor to question or disturb the law as it formerly prevailed. It has not since been cited or referred to as an authoritative precedent and is evidently an inadvertence on the part of the Court and of the able and learned Judge who wrote the opinion. In the case of *Ray v. Patterson,* 170 N. C., 226, to which we were also cited and in which a similar issue appeared, the decision was made to turn principally on an erroneous ruling of the Court as to the *quantum* of proof for which a new trial was allowed, and the instant question was in no way presented or passed upon. Again, there is no rule in our system of jurisprudence that has a greater tendency to maintain the stability of titles and the security of investments than that which upholds the integrity of solemn written deed and protects them from assault by parol testimony except in specified and very restricted instances, and sound public policy which forms the basis of *stare decisis* and its proper application forbids that, on the facts of this record, the decision relied upon by plaintiff should be in any way recognized as a precedent, rendering, as it would, all muniments of title coming under it liable to be altered or set aside by parol evidence as in

ordinary cases. In no aspect of the matter therefore can *Fuller v. Jenkins* be regarded as an authoritative decision available for the protection of the right asserted by plaintiff in the present suit, and the position is fully supported by the decided cases on the subject. Thus, in *Mason v. Cotton Co., supra,* the Court refused to allow the principles of an overruled case in protection of a claimant's rights under an executory contract, the decision being contrary to a general business law and not having been acquiesced in as the settled rule on the subject. And in *Quaker Realty Co. v. La Basse,* 131 La., 996, reported also in 31 Amer. and Eng. Anno. Cases, p. 1073, it was held "That a single decision can seldom serve as a basis for *stare decisis* and never where opposed to previous decisions, especially where they are overruled without being referred to as if they had escaped the attention of the Court." And in the editorial note in the publication referred to there are numbers of cases from courts of the highest authority to the effect that a solitary decision has been held insufficient to change the law on a given subject as it had formerly prevailed. In *Herron, Admr. v. Whiteley Malleable Castings Co. et al.,* 47 Ind. App., 335, it was decided, among other things: "The decisions of the Supreme Court do not constitute the law but are merely evidence thereof, and people have no right to rely thereon until harmonious and well-advised opinions have been reported and have stood unchallenged for a long time.

" . . . 2. Where the decisions of the Supreme Court are conflicting or are so recently made that the parties cannot be presumed to have contracted in reference thereto, the doctrine of *stare decisis* cannot be invoked in support of a contract." In *Stockton, Trustee v. The Duncan Mfg. Co.,* 22 N. J. Eq., p. 56, involving the validity of a tender in United States notes at a time when they were held insufficient for the purpose and the effect of a subsequent decision holding this a valid tender, the Court held: "A change in the law, by decision, is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it. Hence, a tender having been made in United States notes before the commencement of this suit, the mortgage debt must be considered as legally tendered." And the case of *Stowes v. Cortes and Wife,* 90 Texas, p. 283, and *Allen v. Allen,* 95 Cal., p. 185, are in affirmance of the same general principle.

For the reasons indicated we are of opinion, as stated, that the facts established by the verdict and shown in the record are insufficient to support the judgment and that the same must be set aside and a new trial had, with leave given to plaintiff to amend his pleadings, making further averment of his cause of action if the facts available should justify such a course.

Error.

E. K. BRYAN, EXECUTOR OF J. W. HARPER, DECEASED, v. ELLA C. HARPER ET ALS.

(Filed 15 April, 1919.)

Wills — Residuary Clause—Widows—Remarriage—Distribution—Children—Trusts—Executors and Administrators.

A devise to the widow, in the residuary clause, of an equal part, with the named children of the testator, of his estate, altered by his codicil, that in the event of her remarriage during the minority of the children her share shall be equally divided among the children, gives the widow only the proceeds or profits of her distributive share of the personalty, to be paid by the executor named; which shall cease in the event of her remarriage during the minority of the children. *Allen, J.*, writing the opinion of the Court, *Brown, J.*, not sitting.

CLARK, C. J., dissenting; HOKE and WALKER, JJ., concurring in result.

APPEAL by plaintiff and defendants from *Calvert, J.*, at the February Term, 1919, of NEW HANOVER.

This is an action instituted by the executor of John W. Harper against certain of the beneficiaries under his will to ascertain their respective interests in the estate of their testator and for instructions to the executor, and the only question presented by the appeal is as follows:

Has the widow of John W. Harper the right under his will to have paid over to her the share bequeathed to her, or should it be held in trust, giving her only the income during the minority of her children, or until such time as she might remarry during such minority?

The material parts of the will with the codicil thereto are as follows:

"I give, bequeath, and devise all of the residue of my property of whatsoever kind and character or wheresoever situated to my wife, Ella Chitty Harper, and my three children, Catherine, Ella, and James, each to take a one-fourth share thereof."

The will containing this item was subsequently changed by the codicil, a section of which is in the following words:

"In the event my wife, Ella C. Harper, shall remarry after my death, and during the minority of either of my children by her, then the share of my estate given to her by my said will shall be equally divided among my three children, Catherine, Ella and James, in addition to the share given them by my said will."

The property consists of real, personal and mixed property.

His Honor held and rendered judgment accordingly that the executor should not pay to the widow her share of the personal estate, and that she was only entitled to the income therefrom during the minority of the children of the said John W. Harper and then only upon her remaining unmarried, but that upon remaining unmarried until the youngest child became twenty-one she was entitled to her share absolutely, and the widow appealed.

E. K. Bryan attorney for plaintiff.
W. B. Campbell attorney for Ella C. Harper.
Carr, Poisson & Dickson attorneys for Guardian ad litem.

ALLEN, J. Two cases in our Reports (*Simmons v. Flemming,* 157 N. C., 390, and *Braswell v. Morehead,* 45 N. C., 28) are decisive of the appeal.

The Court said in the first of these cases, citing *Ritch v. Morris,* 78 N. C., 377, and *Britt v. Smith,* 86 N. C., 308, "The rule seems to be that whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder, but when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman," and in the second, which is approved in *Williams v. Smith,* 57 N. C., 256; *Gorden v. Lowther,* 75 N. C., 195; *Peterson v. Ferrell,* 127 N. C., 169, "Owners of executory bequests and other contingent interests stand in a position, in this respect, similar to vested remaindermen, and have a similar right to the protective jurisdiction of the court."

The bequest to Mrs. Harper is in a residuary clause, is contingent upon her remaining unmarried until the youngest child becomes twenty-one, and falls directly within these authorities.

The case of *Williams v. Cotton,* 56 N. C., 395, which contains expressions seemingly at variance with the decision in *Braswell v. Morehead,* is considered and distinguished in *Ritch v. Morris* and *In re Knowles,* 148 N. C., 461, and is shown to have rested upon the peculiar character of the property disposed of in the will then under consideration and on the language of the will.

Nor is the condition or limitation in the will, providing that the bequest to the widow be equally divided between the children of the testator in the event she shall remarry during the minority of either of the children, void as a restraint upon marriage.

"It is very generally held that conditions against the remarriage of the testator's widow are valid, whether the property be real or personal, and whether there is an immediate gift over or not; and the same is true against the remarriage of a widower." 40 Cyc., 1702, citing in support of the text decisions from the Supreme Court of the United

States and from the highest courts of twenty-four States and from the courts of England and Canada.

In the note to the Matter of Seaman, Ann. Cas., 1918 B, 1144, after discussing the proposition that a condition in general restraint of marriage is void, the editor says:

"Where, however, a condition subsequent in total restraint of marriage is imposed on the wife or the husband of the testator the courts will uphold the condition. *Daboll v. Moon,* 88 Conn., 387, Ann. Cas. 1917 B 164, 91 Atl. 646, L. R. A. 1915 A 311; *Nagle v. Hersch,* 59 Ind. App. 282, 108 N. E. 9; *Knost v. Knost,* 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; *Sullivan v. Garesche,* 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; Matter of Schriever, 91 Misc. 656, 155 N. Y. S. 826; *Littler v. Dielmann,* 48 Tex. Civ. App. 392, 106 S. W. 1137; *Haring v. Shelton* (Tex.) 114, S. W. 398; *Re Allen,* 7 Dom. L. Rep., 494; *Re Lacasse,* 24 Ont. W. Rep. 300, 9 Dom. L. Rep. 831, 4 Ont. W. N. 986.

It will be noted that these authorities make no distinction between the widow and the widower, and that the wife has the same right as the husband to make her gift conditional upon remaining single.

The case of *In re Miller,* 159 N. C., 124, goes much further because there a condition attached to a devise of realty to a daughter that upon her death or marriage the estate should go to a son, was sustained as a valid conditional limitation, and commenting on this case in *Gard v. Mason,* 169 N. C., 508, the Court says that the fact that there is a limitation over upon marriage, as in this case, is "determinative," "controlling," in favor of the validity of the provision in bequests of personal estate, and "is always allowed much weight in cases of real estate."

In our opinion his Honor properly held that the widow was not entitled to have her share of the personal estate turned over to her, and the judgment is

Affirmed.

CLARK, C. J., dissenting: The will provides: "I give, bequeath and devise all the residue of my property of whatsoever kind and character, or wheresoever situated, to my wife, Ella Chitty Harper, and my three children, Catherine, Ella, and James, each to take a one-fourth share thereof."

A section in the codicil provides: "In the event my wife, Ella C. Harper, shall remarry after my death, and during the minority of either of my children by her, then the share of my estate given to her by my said will shall be equally divided among my three children, Catherine, Ella, and James, in addition to the share given them by my said will."

I cannot concur in so much of the opinion as holds that the forfeiture imposed by the codicil upon the devise above set out to the wife, should she marry before the youngest child becomes of age, is valid, because:

1. It is not necessary to pass upon the point in this case, and therefore it is *obiter* and cannot have any valid force and effect as a precedent.

2. The precedents in declaration of a sound public policy are quite uniform that while a devise to a wife "during widowhood" or "so long as she shall remain unmarried" is valid, a devise to her absolutely with a clause of forfeiture in event of her remarriage is a nullity. The difference is not a mere technicality, or an attenuated distinction, but is founded upon sound reason and public policy. *In re Miller,* 159 N. C., 123. When the devise is made to the wife with the limitation that it is during widowhood or so long as she shall remain a widow, she can make her election whether to take the devise or her dower, whichever is the larger provision, but when possibly a larger amount is devised to her absolutely, with a provision of forfeiture in case of remarriage, she will be induced to take the devise, not having at that time naturally any thoughts of remarriage. But should circumstances alter, or if she should subsequently find her affections engaged the forfeiture will then be called into existence. It is not public policy to discourage marriages, but the contrary. The authorities making the above distinction are numerous. "A gift in general restraint of marriage is void whether a gift over accompanies it or not." Schouler on Wills (2 Ed.), sec. 603 and notes; 2 Jarman Wills, sec. 45. To same purport 40 Cyc., 1699, and numerous cases there cited in notes. The distinction is made between a conditional limitation which is held valid and a forfeiture which is invalid.

That this distinction is founded upon a sense of natural justice and a sound public policy is shown by the fact that while the statutes allotting dower to the widow for her support generally restrict the allowance to her life, there has been not a single country or State which has ever been cruel enough to women, or deemed it sound public policy, to provide for the forfeiture of dower on remarriage of the widow. What has ever been considered contrary to public policy and unjust in the statute must be the same in a devise, and therefore the decisions which have held that where the devise is taken in lieu of dower any provision for forfeiture upon remarriage is invalid are in accordance with public sentiment of justice to the woman and the welfare of the State.

Restraints upon marriage are disfavored because of the tendency to restrict increase of population and encourage immorality, besides there is the injustice of the imposition upon the living of the will of the dead as a guide of conduct. This is so held in *Gard v. Mason,* 169 N. C., 508; *Watts v. Griffin,* 137 N. C., 572.

There is no decision in this State contrary to what is said above. Decisions on both sides *pro and con,* as on nearly every proposition, can be found elsewhere, but no statute can be found anywhere validating a forfeiture of an estate by the widow for remarriage.

The history of the law shows that in nearly every instance discriminations against women have been created by the courts, especially by the purely judge-made law styled the "common law," and rarely by statute.

The poet of the democracy of justice and equality of opportunity and right to all, Robert Burns, said: "Man to man so oft unjust, is always so to woman." In India, where the wife was deemed entitled to existence only as an attendant and appendage of the husband, she was doomed to suttee—to be burnt alive upon the funeral pyre of the husband—till this was abolished by the British. There is but a difference in degree, not in principle, if the dead hand of the husband can reach out of the grave and can take from his widow by a clause of forfeiture the property he devised her in fee—in lieu of the dower the law gave her, without liability to forfeiture—for the offense of marrying again.

Governor Swain, in his address at Tucker Hall, said: "Four-fifths of the wills that I have had occasion to construe give to the 'dear wife' a portion of the estate, pared down to the narrowest limit that the law will allow, 'during life or widowhood.' So universal and inveterate is this phraseology that a somewhat famous parson in the county of Gates, some years ago at the funeral of her husband, poured forth a most fervent supplication that the bereaved wife might 'be blessed in her basket and her store, during life or widowhood.'"

WALKER, J., concurring: My view of this case is that the question as to the validity of the clause providing that in the case of the widow's remarriage, during the minority of the children, the estate should go to them, is directly involved, and that the opinion of the Court upon its legality is not a mere dictum. We are called upon to construe the clause and to decide that very question, as *Justice Allen* says at the outset, in the statement of the case, his language being as follows: "This is an action instituted by the executor of John W. Harper against certain of the beneficiaries under his will to ascertain their respective interests in the estate of their testator and for instructions to the executor, and the only question presented by the appeal is as follows: Has the widow of John W. Harper the right under his will to have paid over to her the share bequeathed to her, or should it be held in trust, giving her only the income during the minority of her children, or until such time as she might remarry during such minority." So that we must determine whether the fund must be held by the trustee during the widow's life or paid over to the children at the time of her marriage, if she does

remarry. This is a question of moment, and invokes our decision upon the validity of the remarriage clause. If she does marry, and the clause is valid, the executor or trustee will pay it over to the children at once, and she loses her share of the income of the fund thereafter. If she does not marry, her share does not go to the children. I can perceive no substantial difference between giving her a part of the fund during widowhood (*durante viduatate*), which may mean an estate for life (for an estate during widowhood is an estate for life, as stated by Blackstone and other writers), and giving it to her for life or until she marries, for an estate during her widowhood would necessarily mean one for life unless she remarries, in which event it would go over to others named in the will. The difference between the two expressions is in form and not in substance. Blackstone (Book 2, star page 121) says: "There are some estates for life which may determine upon future contingencies, before the life for which they are created expires. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist they are reckoned estates for life, because the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil death,* as if he enters into a monastery, whereby he is dead in law; for which reason in conveyances the grant is usually made 'for the term of a man's *natural* life,' which can only determine by his natural *death.*"

NANCE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 15 April, 1919.)

1. Appeal and Error—Objections and Exceptions.

The Supreme Court, on appeal, will not separate the competent from the incompetent and prejudicial evidence embraced by one exception, and grant a new trial for the admission of that which is incompetent.

2. Contracts—Breach—Actions.

A party to a contract can maintain an action for its breach upon averring and proving a performance of his own antecedent obligations arising on the contract, or that he was prevented from performing it by the other party or those acting for him.

3. Contracts—Breach—Evidence—Board.

Where the plaintiff and defendant have contracted that the former will board and lodge the defendant's employees and furnish them the same kind of food that he had theretofore been furnishing his other boarders,

and there is evidence, in defendant's behalf, that the food did not meet these requirements, for which reason the employees had left the plaintiff's boarding house, testimony of a witness that she had eaten at plaintiff's place before and after the employees came, and that the supper spread for them "was well cooked" and looked "nice as anybody's" was competent as tending to show that the food furnished met the requirements of the contract.

4. **Appeal and Error—Evidence—Corroboration—Restrictions—Instructions—Exceptions.**

Exception that evidence admissible only for the purpose of corroborating a witness should have been so confined on the trial of the action, must be to the refusal of the court to give a requested prayer for instruction properly worded and aptly tendered, or it will not be considered on appeal.

5. **Evidence—Res Inter Alios Acta—Competency—Knowledge of Witness.**

Testimony of a witness as to matters relevant to the inquiry and within his own knowledge is not objectionable as *res inter alios acta.*

6. **Contracts—Breach—Measure of Damages—Board—Waiters.**

Where damages are sought in the action for the failure of defendant's employees to board with the plaintiff, in breach of a contract to that effect, with evidence that the plaintiff had incurred additional expense to receive them, testimony that the plaintiff had hired a special waiter is competent, as having the food properly served at the table, was a necessary requirement, the measure of damages being gains prevented as well as loss sustained caused by the breach, which were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty.

7. **Contracts—Issues—Breach—Damages.**

Where there is a denial of a breach of contract as alleged in an action thereon, with supporting evidence in favor of each party to the controversy, an issue submitted only as to the amount of damages, without one as to its breach, is disapproved.

ACTION tried before *Shaw, J.,* and a jury at November Term, 1918, of DAVIDSON.

Plaintiff sued for damages, alleging that he contracted with the defendant to board and lodge nine of its employees at one and 25-100 dollars per day for each of them, and that after staying with him a few days they left his home, without any legal or sufficient cause, although he had to incur great expense in preparing to perform his part of the contract, and while they were with him as boarders and lodgers he supplied them with good and wholesome food and comfortable lodging, and was, at all times, able, ready, and willing to perform the contract throughout the time named therein. The defendant denied the allegations of the complaint.

The jury returned the following verdict:

What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "$150."

Judgment and appeal by the defendant.

J. F. Spruill for plaintiff.
Francis R. Stark and Walser & Walser for defendant.

WALKER, J., after stating the case: There is but one question which requires consideration. Mrs. Wafford testified that she had eaten at the plaintiff's boarding house both before and after the employees came there, and saw the supper which was spread for them on the night they did not come, when they agreed to come and were expected by the plaintiff to come, and it "looked nice," was well cooked and "looked as nice as anybody's." Defendant objected to this testimony, but it will be observed that at least some of it was clearly admissible, and the objection must fail, for where a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be sustained. Defendant should have separated the "good from the bad," and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule. *S. v. Ledford,* 133 N. C., 722; *Barnhardt v. Smith,* 86 N. C., 479; *Phillips v. Land Co.,* 174 N. C., 542, 545, and cases cited; *Caldwell County v. George,* 176 N. C., 602. We have very recently, at this term, approved this rule. It also applies to the charge of the court. *Ritter L. Co. v. Moffitt,* 157 N. C., 568; *Hendricks v. Ireland,* 162 N. C., 523; *Sigmon v. Shell,* 165 N. C., 582. And also to a demurrer in pleading. *Caho v. R. R. Co.,* 147 N. C., 23; *Hay v. Collins,* 118 Ga., 243; *Sloan v. S. A. L. Ry. Co.,* 64 S. C., 389; *N. and W. R. Co. v. Stegall's Admx.,* 105 Va., 538; *Va. and N. C. Wheel Co. v. Harris,* 103 Va., 708.

But the testimony as to the kind of meals provided by plaintiff before the boarders came was relevant and competent, not generally or in all cases, but in this case, because of its peculiar facts. Plaintiff kept a boarding house and agreed for a consideration to take these employees of defendant as boarders, giving them such lodging and table board as he had theretofore furnished to his other boarders. There was no special provision for better board or accommodations. It was competent for the witness, therefore, in stating what kind of table board they received after coming there, to compare it with that furnished before they came, as tending to show that, under the contract, which was general in its terms, and called for the same kind of accommodations and board theretofore supplied, the employees received the ordinary and usual board, and not such as they stated had been received. But if not substantive evidence it was, at least, corroborative of the witness, and no special instruction was asked as to how it should be applied by the jury, as required by Rule 27 of this Court. 164 N. C. (Anno. Ed.), p. 438.

The question to be decided, when this class of testimony is offered, is whether it is relevant—that is, whether it rationally tends to prove the fact in issue, and is so related to it as to form a reasonably safe basis for a conclusion in regard to the fact. Where the defense in an action brought to recover for labor was that the plaintiff had unskillfully performed such labor, evidence that he had unskillfully performed other labor was held irrelevant. *Campbell v. Russell,* 139 Mass., 278; *McGuire v. Middlesex R. Co.,* 115 Mass., 239. Among inferences which, except under certain conditions, the law will not permit to be drawn, is that a person has done a certain act because he has done a similar act at another time. 17 Cyc., 279. The evidence in this case was both relevant and competent—relevant because it tended to prove a material fact, and competent because the witness had personal knowledge of the matters to which she testified, and her statement was not *res inter alios acta,* as suggested by defendant's counsel. It will be noticed that Mrs. Wafford spoke of the table fare both before and after B. H. Moore and the other employees came to board. She saw the supper spread for them and of which they did not come to partake, and she also had eaten at Mrs. Nance's table before that day. All this evidence tended to rebut that of the defendant, and to show that there had been full compliance with the terms of the contract by the plaintiff.

If the testimony offered in behalf of the plaintiff was found by the jury to be true, which seems to be the case, the plaintiff furnished such meals and substantial food as were sufficient to satisfy the normal appetite, though not, perhaps, suited to those of fastidious tastes. He was not required, under the contract, to gratify the luxurious tastes of an epicurean.

The testimony of Mrs. Wafford, that her daughter was employed by plaintiff to help in the house when the new boarders should come, and that she was afterwards told by plaintiff that her child's service would not be needed, as his wife could do the work after the boarders had left, if not harmless, tended to show that plaintiff, as he stated, had prepared, after making the contract, to receive his guests and have the proper waiters at the table for serving the meals. They could not eat if they could not get the food, and there must be some one to bring it to them. This is not an unusual but a customary provision at a boarding house or a hotel. This proof was offered to show plaintiff's readiness to perform his part of the contract.

A party to a contract can maintain an action for its breach upon averring and proving a performance of his own antecedent obligations arising on the contract, or that he was prevented from performing it by the other party or those acting for him. *Tussey v. Owen,* 139 N. C., 460. And as to the damages, profits, which would certainly have been

realized but for the defendant's fault are recoverable. *Hardware Co. v. Buggy Co.,* 167 N. C., 423. The principal rule in such cases is that the party injured is entitled to recover all the damages, including gains prevented as well as losses sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. *Gardner v. Telegraph Co.,* 171 N. C., 405, 407. The doctrine is thus well stated in *Griffin v. Culver,* 16 N. Y., 489: "The broad general rule in such cases is that the party injured is entitled to recover all the damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: 'The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed.'" This Court, when discussing this rule, said in *Hardware Co. v. Buggy Co., supra:* "As shown by further reference to the authorities, this 'certainty' referred to by the learned judge does not mean mathematical accuracy but a reasonable certainty," citing Sutherland on Damages and Hale on Damages, pp. 70-71. The subject is fully considered as to broken contracts in *Machine Co. v. Tobacco Co.,* 141 N. C., 284, where we held:

"1. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. *Griffin v. Culver, supra.*

"2. The law seeks to give full compensation in damages for a breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient certainty.

"3. In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation."

A text-writer thus refers to the rule: "In an action for damages the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered though plaintiff can

only give his loss approximately." Hale on Damages, p. 70, quoted with approval by this Court in *Bowen v. King,* 146 N. C., 385. And further, on p. 71: "A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented, but absolute certainty is not required. Compensation for prospective losses may be recovered when they are such as in the ordinary course of things are reasonably certain to ensue. Reasonable means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed." And as to torts, the rule applicable to them is stated in *Johnson v. R. R. Co.,* 140 N. C., 574.

Some of these questions are not presented by the assignments of error, but they are discussed to some extent in the briefs, and we have deemed it proper that we should refer to them.

We will not close without adverting to the form of the issue, which we do not approve. There should have been an issue as to whether there had been a breach of the contract, the defendant having denied that there had been one. The second issue, then, should have been in the form of the one submitted, or substantially so. But there was no objection to the form of the issue, and we merely refer to it, because such an issue has been condemned by this Court. *Denmark v. R. R. Co.,* 107 N. C., 186; *Hatcher v. Dabbs,* 133 N. C., 239; *Shoe Co. v. Hughes,* 122 N. C., 296. If the breach had been admitted, then, of course, the issue submitted would be the proper one.

There was no error in the trial of the case, and we find none in the record.

No error.

E. K. INGRAM v. BETTIE CORBIT ET AL.

(Filed 15 April, 1919.)

1. **Parties—Joinder—Ejection—Damages—Possession—Lessor and Lessee—Contracts—Breach—Parties—Widows—Heirs at Law—Executors and Administrators.**

   The widow, the administrator, and the heirs at law of the deceased owner of lands are proper parties to an action of ejectment and to recover damages brought by the lessee of lands for a term of years for breach of the lease by the entry of the widow under proceedings for dower, wherein the *locus in quo* had been included.

2. **Ejection — Dower—Lessor and Lessee—Parties—Judgment—Estoppel—Statutes.**

   The lessee of lands for a term, during the continuance of the lease after the death of the deceased owner, is a proper and necessary party to proceedings to lay off the widow's dower wherein the *locus in quo* had

been included (Revisal, sec. 3088), and where he has not been made a party in these proceedings he is not bound by the judgment therein in his action of ejectment and to recover damages against the widow, the administrator, and the heirs at law.

3. **Actions—Joinder—Ejectment—Lessor and Lessee—Contracts—Dower—Statutes.**

Where a widow has taken possession of lands during the continuance of a lease made thereof by her deceased husband, the owner, claiming under and included in an allotment of her dower, and the lessee sues in ejectment and for damages the widow individually, as administratrix and as guardian for their minor child, and sole heir at law, the cause of action alleged as to all arose from the same transaction, the lease, and were properly joined under the provisions of the Revisal, sec. 469(1), and to prevent a multiplicity of suits.

4. **Parties—Lessor and Lessee—Dower—Allotment—Heirs at Law—Widow.**

Where the widow wrongfully claims and is in possession of lands during the continuance of a lease thereof made by her husband, since deceased, as a part of her dower laid off to her in proceedings therefor, the heir at law is a proper and necessary party in the lessee's action to reallot her dower and to repossess the land covered by the lease.

5. **Pleadings—Demurrer—Statute of Frauds.**

In the lessee's action to repossess lands covered by his lease, the statute of frauds may not be taken advantage of by demurrer, upon the ground that the *locus in quo* was not sufficiently described in the lease; and where the plaintiff was at least a tenant from year to year he is entitled to damages for a wrongful breach of his lease by the widow claiming dower therein.

6. **Leases—Betterments—Statute of Frauds—Parties—Cancellation.**

Where the plaintiff brings his action of ejectment and for damages against the widow of the deceased lessor, who has taken possession under a claim of dower, and his administrator and heirs at law, if the statute of frauds is successfully pleaded as to the sufficiency of description of the lands in the written lease, under which he had put improvements upon the lands, the lessee is entitled to recover for betterments and to cancellation of note and chattel mortgage he has given thereon to secure the payment of the rent for the stated term of years, the joinder of the heirs at law as parties being surplusage.

APPEAL by plaintiff from *Lane, J.*, at March Term, 1919, of GUILFORD.

In June, 1914, E. T. Corbit, deceased, executed a lease to plaintiff for one acre of land for ten years, and agreed to erect a slaughter-house and dig a well thereon. The plaintiff delivered to Corbit his note in the sum of $500, secured by the chattel mortgage, in payment of the ten years rental. It is alleged in the complaint and is admitted by the demurrer that pursuant to the contract Corbit enclosed an acre of land with a wire fence, erected the slaughter-house thereon, and dug the well; that plaintiff went into possession and remained in possession during the lifetime of Corbit, who died in November, 1914; that his wife, the

defendant herein, qualified as his administratrix and also as guardian for his only heir, her daughter Alberta; that plaintiff paid the annual rental to the widow for the years 1915 and 1916, but she refused to accept the rental for 1917, and locked up the slaughter-house and excluded plaintiff therefrom. Prior to locking up the slaughter-house she had dower allotted, including therein the leased land. Prior to the death of Corbit the plaintiff had placed valuable improvements on the land. The defendants demurred to the complaint upon the ground that it did not state a cause of action either against the widow individually nor as administratrix, nor as guardian, and because there was a misjoinder of causes of action and a misjoinder of parties. The court sustained the demurrer and dismissed the action. The plaintiff appealed.

L. B. Williams, Brooks, Sapp & Kelly for plaintiff.
C. C. Barnhart, W. P. Bynum, and R. C. Strudwick for defendants.

CLARK, C. J. The contract, executed 15 June, 1914, by E. T. Corbit to Eli Ingram, specified that said Corbit "has this day leased to the party of the second part about one acre of land for a term of ten years as a place to butcher, on the following terms and conditions, to wit: The said party of the first part agrees to furnish $400 in cash towards building a slaughter-house. It is mutually agreed and understood that the said party of the first part is to have all the manure, bones, offal, and refuse from said slaughter-house, and also to have access and the privilege of butchering his own hogs, cattle, etc., and have the privilege of getting water to water his hogs, cattle, and other stock.

"It is further understood and agreed that the party of the second part is to pay the party of the first part the sum of $50 rent for the use of said house on the 15th day of June of each and every year for ten years—that is, $50 a year during the life of said lease.

"The party of the second part is to also give the party of the first part his note for $500, without interest, secured by a chattel mortgage on his fixtures in meat market for the faithful performance of this contract, and at any time the party of the second part fails or refuses to pay his rent as above stipulated the party of the first part is hereby authorized and empowered to advertise and sell the property embraced in said chattel mortgage to make his money, costs, and expenses of the said sale.

"It is also understood and mutually agreed that the house and all improvements on said land at the expiration of said lease are to remain and be the property of the party of the first part."

The amended complaint avers that the plaintiff since the date of the contract has been in possession of said lot, enclosed by a wire fence

erected by said Corbit, describing the said lot, and that soon after 15 June, 1914, said Corbit dug the well on said lot, built the slaughter-house thereon, and put in the fixtures; that the defendant Bettie Corbit, individually and as guardian of her daughter, is in possession of said property, which she took possession of without giving the plaintiff notice of her intention to terminate the lease, and alleges damages; he asks that the allotment of dower be declared null and void, that he recover possession of said property and damages for the detention of the same. The demurrer is upon the ground that no cause of action is stated against her, either individually or as administratrix or as guardian of her daughter; and further, a misjoinder of causes of action on the part of the defendant. It was error to sustain the demurrer as to misjoinder of causes or action or misjoinder of parties.

If the lease is valid it was necessary in an action of ejectment to make the widow, who claimed possession under an allotment of dower, a party defendant, and also as guardian of her daughter. She was also a proper party as administratrix to answer the demand for damages. The allotment of dower would be a defense for her to set up and would not be an estoppel against the plaintiff who is not a party thereto. Moreover, the plaintiff had a right to demand that dower should be allotted in land other than the leased land provided there was sufficiency thereof. *Harrington v. Harrington,* 142 N. C., 517. To prevent a multiplicity of actions this could be ascertained in this proceeding (*Sparger v. Moore,* 117 N. C., 450), and the heir at law, represented by her guardian, was a proper party, and the plaintiff also is a proper and necessary party. Rev., 3088.

Revisal, 469 (1), provides that the plaintiff may unite in the same complaint several causes of action, whether legal or equitable, when they all arise out of "the same transaction, or transaction connected with the same subject of action." Here there was but one matter, the lease, and the breach thereof by the widow taking possession of the property under a claim of dower, for which the plaintiff claims restitution from her individually and as guardian of the heir at law, and damages from her as the personal representative of her husband.

In *Morton v. Telegraph Co.*, 130 N. C., 303, relied on by defendants, there were three plaintiffs stating separate causes of action for mental anguish for nondelivery of a telegram. Also in *Thigpen v. Cotton Mills,* 151 N. C., 97, there were two plaintiffs. Of course in such case the transactions were entirely different, and there being a misjoinder of causes and of parties, the action was dismissed. When there is merely a surplusage of parties, it is not ground for dismissal as it cannot prejudice the cause of action, and at most the unnecessary party could be

dismissed on his own motion with his costs. *Abbott v. Hancock,* 123 N. C., 102, and cases there cited. See, also, citations in Anno. Ed.

In *Fisher v. Trust Co.,* 138 N. C., 224, the whole subject of misjoinder was fully considered, and it was held, with citation of many authorities, that "When the grounds of the complaint arise out of one and the same transaction or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, it is not multifarious" -that is, a demurrer will not lie for misjoinder. See, also, the numerous citations to that case in the Anno. Ed. and the later cases, *Chemical Co. v. Floyd,* 158 N. C., 462; *Ayers v. Bailey,* 162 N. C., 212, and *Lee v. Thornton,* 171 N. C., 213, 214, in which *Walker, J.,* says that he had not concurred in *Fisher v. Trust Co.* but "recognizes that the principle of that case has since been thoroughly settled by the decisions of this Court and is now an established rule of pleading, and has acquiesced in it for that reason." Moreover, in this case the plaintiff had a right to demand that Mrs. Corbit's dower be allotted in the land other than the leased land, provided there was a sufficiency thereof, *Harrington v. Harrington,* 142 N. C., 517, and the heir at law is a proper and necessary party to this proceeding, to reallot the dower as well as in the proceeding by plaintiff to recover possession, and necessarily appears by her guardian. The plaintiff was a proper and necessary party to the dower proceeding by the very terms of the statute itself. Rev., 3088. Not having been made a party the judgment therein is not an estoppel as to him and it is not necessary that he should come forward by a motion in that cause. The allotment of dower being a nullity as to him, its reallotment is incidental to the cause of action in this case, the chief ground of which is for recovery of the realty and damages.

It may be that the contract is unenforceable for total lack of description in the property leased, for the house and well were not thereon at the date of the lease. This was not remedied by the subsequent action of the lessor. This, however, does not arise upon this appeal, for the statute of frauds cannot be taken advantage of by demurrer. *Stephens v. Midyette,* 161 N. C., 323. *Non constat* but the defendants might admit the contract. The plaintiff was at least a tenant from year to year and entitled to damages for ejectment. 42 L. R. A. (N. S.), 648.

As the case, however, goes back, should the statute of frauds be pleaded upon the ground of the insufficiency of the description of the property the plaintiff would also be entitled to recover for his betterments in equipping the building and making additions thereto and to the surrender and cancellation of his note and chattel mortgage.

It is true that in this view the action would be against the widow, individually and as administratrix. Her joinder as guardian of the

heir would be mere surplusage, except to plead the statute of frauds, and not ground for dismissal of the action or even for a demurrer. *Abbott v. Hancock, supra.* In any view, there was a cause of action stated.

Reversed.

COBLE & STARR v. E. P. WHARTON, TRUSTEE.

(Filed 15 April, 1919.)

1. Contracts—Conditional Sales—Chattel Mortgages—Deeds and Conveyances—Registration—Priorities—Statutes.

A conditional sale reserving title to personal property in the vendor until the full payment of the purchase price, must be reduced to writing and registered as in case of chattel mortgages, to be available as against creditors or purchasers for value. Pell's Revisal, secs. 982, 983.

2. Same—Debtor and Creditor—General Assignment—Trusts and Trustees—Purchasers for Value.

A trustee in a deed of general assignment for the benefit of creditors is a purchaser for value within the meaning of our registration laws, and when this deed of trust has been registered it takes priority over a written conditional sale prior executed but subsequently registered.

3. Same—Equities—Present Consideration.

The trustee in a deed of general assignment for the benefit of creditors is a purchaser for value in contemplation of our registration law giving preference to the title acquired under a prior registered conveyance; and objection that a present consideration is required is untenable, as this principle applies only where there are equities inherent in the property itself which, if established, would defeat the title of the present owner, and does not extend or apply to claimants under conveyances coming within our registration laws, which expressly provide that priority of right shall depend upon the time of registration. Pell's Revisal, secs. 982, 983.

CONTROVERSY without action, heard before *Lane, J.*, at March Term, 1919, of GUILFORD.

From the facts submitted it appears that on 16 March, 1918, plaintiff bargained to Richardson Hay and Grain Company a motor truck for $2,950, and that $2,000 of the price remains unpaid. And on 7 February, 1919, plaintiffs bargained to same firm another motor truck for $2,500, and that $1,125 of this price remains unpaid. That, in evidence of the contract and in security of the balance due, the plaintiff took from the purchaser in each case a written instrument, constituting a conditional sale of the property, to secure the respective amounts due, and the property was at the time delivered to the purchaser who had the same in possession and use till the time hereinafter set forth; that these

instruments were duly proved and recorded in said county on 3 March, 1919; that on 1 March, 1919, said company, having become insolvent, executed to defendant in proper form, etc., a general deed of assignment for the benefit of creditors for all property, real and personal, of the company, including said trucks; that on the same day, 1 March, 1919, the said instrument was duly proved, recorded in said county, and the property delivered to defendant, according to its terms, who still has the same in possession; that the assets of the company, the grantor in said deed of assignment, are largely insufficient to pay off and discharge the indebtedness of the company, and the question is as to the ownership and right of possession of the trucks included in the conditional sale to plaintiff. Upon these facts the court entered judgment for the defendant and plaintiff, having duly excepted, appealed.

C. R. Wharton and Chas. A. Hines for plaintiffs.
King & Kimball for defendants.

HOKE, J. Since 1883 it has been the law of this State that, in order to be available against creditors or purchasers for value, a conditional sale must be reduced to writing and registered as in case of chattel mortgages. Pell's Revisal, secs. 982 and 983. And in numerous decisions on the subject it has been held that a trustee, in a general assignment for the benefit of creditors, is a purchaser for value within the meaning of the statute, some of them being directly to the effect that such a trustee, when the instrument under which he acts is first registered, will take precedence over the rights of a vendor whose interests are protected and embodied in a conditional sale prior in date but subsequently registered. *Observer Co. v. Little,* 175 N. C., p. 42; *Bank v. Cox,* 171 N. C., pp. 76-81; *Odom v. Clark,* 146 N. C., pp. 544-552; *Drill Co. v. Allison,* 94 N. C., p. 553; *Brem v. Lockhart,* 93 N. C., p. 191; *Potts v. Blackwell,* 57 N. C., p. 58; *S. c.,* 56 N. C., p. 449.

In *Observer Co. v. Little,* the Court said: "By the express terms of the law and under various decisions construing the same, these conditional sales are to be regarded as chattel mortgages and void as to creditors and purchasers except from registration," citing *Clark v. Hill,* 117 N. C., p. 11; *Brem v. Lockhart, supra,* etc.

In *Bank v. Cox, supra,* it is said: "They contend that plaintiff was not a purchaser for value within the meaning of the registration laws because its mortgage was made to secure an antecedent debt, but we have decided otherwise in numerous cases." *Odom v. Clark,* 146, p. 552, where it was said: "Claimants who now object to this judgment are holders of preexisting debts provided for in these deeds. It has been held with us that such debts are sufficient to constitute the holders pur-

chasers for value within the meaning of our registration laws. *Brem v. Lockhart,* 93 N. C., p. 191; cited with approval in *Moore v. Sugg,* 114 N. C., p. 292." See, also, *Brown v. Mitchell,* 168 N. C., p. 312; *Southerland v. Fremont,* 107 N. C., pp. 565-572; *Potts v. Blackwell,* 57 N. C., p. 58. And in *Brem v. Lockhart,* a case decided not long after the enactment of the statute and involving the precise question presented in this record, on an issue between a trustee under a general assignment for creditors and the holders of a conditional sale in writing but not registered. In upholding the title of the trustee the Court said: "The statute applicable to chattel mortgages or deed conveying personal property in trust to secure debts, to facilitate the making of which a form is given, thus extended to conditional sales or contracts in which the title remains in the vendor as a security for the purchase money, declares them to be 'good to all intents and purposes when the same shall be duly registered according to law.' Sec. 1274. These instruments are thus brought under the operation of the previous general law, which refuses any validity to deeds of trust or mortgages of real or personal estate as against creditors and purchasers for a valuable consideration from the bargainor and mortgagor until they are registered. Sec. 1254. The effect produced by this legislation upon conditional sales of personal goods is to render inoperative so much of the contract as undertakes to reserve property in the vendor as a security for the purchase money, unless and until the contract is registered, and, so far as creditors and purchasers for value are concerned, the transfer must be absolute and unconditional." Under the principle recognized in these cases, and many others could be cited, the court below correctly ruled that the title of the defendant, the trustee, under a general assignment for creditors, registered 1 March, 1919, should be preferred to that of the vendor whose interests were secured and embodied in a contract of conditional sale, executed some time before but not registered until 3 March, two days thereafter. It is earnestly contended for plaintiff that Brem and Lockhart is in such conflict with other decisions of the Court and has been so modified by later cases on the subject that it can no longer be regarded as authoritative in support of defendant's claim, citing for the position, among others, *Bank v. Bank,* 158 N. C., p. 238; *Wallace v. Cohen,* 111 N. C., p. 103; *Southerland v. Fremont,* 107 N. C., p. 565; *Day v. Day,* 84 N. C., p. 408; *Small v. Small,* 74 N. C., p. 16, but we do not so interpret the decisions relied upon. They all hold, as plaintiff contends, that in order to constitute one a purchaser for value, affording protection for his estate against equities, there must be a new consideration moving between the parties, and for such purpose an existent or antecedent debt will not suffice. But the equities referred to in these and other similar cases are those inherent in the property itself which

antagonize the estate or interest of the alleged or present owner, and are superior to it when and to the extent they may be established, and the position does not extend or apply to deeds coming under our registration laws and which expressly provide that priority of right shall depend on the time of registration. A reference to some of the cases to which we were cited by plaintiff will serve to illustrate the kind of equities properly calling for application of the principle upon which he relies. Thus, in *Wallace, etc. v. Cohen, supra,* it was held that a vendor of goods who had been induced to sell the same by fraudulent representations on the part of the purchaser was allowed to recover the same or their value from an assignee for the benefit of existent creditors; an equity for rescission of the contract of sale on the ground of fraud. In *Day v. Day,* a father, induced by the fraud of his son to make the latter a deed in fee without reservation of a life estate as the parties had intended, was allowed to have the deed reformed so as to express the true agreement as against a trustee for the benefit of the son's creditors, the distinction we are discussing being stated as follows: "A third person, to whom the son conveys the land in trust to pay his debts, is a purchaser for value both under 13 and 27 Elizabeth, but takes the land subject to the equity which had attached to it in the hands of the grantor." An equity for reformation. And, in *Small v. Small,* where a grandson had purchased and taken title to his ward's land at a sale procured by him and conveyed the same in trust to secure antecedent debts, it was held that such conveyance afforded no protection against the claim of the wards in equity to engraft a trust on the vendor's title. And in *Southerland v. Fremont,* 107 N. C., p. 565, a case on which plaintiff greatly relies and which he insists is in direct conflict with *Brem v. Lockhart,* two cosureties had signed an obligation for the payment of money with a third and primary surety, under an agreement between them that the latter should indemnify the cosureties as to one-half of the debt. In pursuance of such agreement, the primary surety executed a deed of trust on the property to one of the cosureties for the benefit and protection of both. Later the surety, trustee, wrongfully, without the knowledge of the cosurety and without consideration, so far as appears, executed a deed of release to primary surety, relieving the property from the terms of the deed. The primary surety then mortgaged the land to his wife to secure an antecedent debt. It was held that the facts gave the cosurety an equitable right to have the release set aside, thus restoring his rights under the deed of trust made for his benefit. Here again the principle is stated as follows: "The mortgagor of land to secure a preexisting debt is a purchaser for value under 13 and 27 Elizabeth, but he takes subject to any equity that attached to the property in the hands of the debtor." And in *Bank v. Bank* a similar

ruling was made, the rights of the claimant in the property being made available to him under the equitable doctrine of subrogation.

While some of the expressions in *Brem v. Lockhart* have been commented on as being too broad, the decision in that case has been in no way modified or disturbed, and is to the effect, as stated, that an assignee for benefit of creditors, whether present or antecedent, is a purchaser for value within the meaning of our registration acts, and when such an instrument is first recorded, the title of the assignee will be preferred to that of the original vendor of the property whose rights therein are evidenced and secured by a conditional sale unregistered or which has been registered subsequently to the deed. There is no error and the judgment for defendant must be affirmed.

No error.

MARY H. UNDERWOOD v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 15 April, 1919.)

1. Insurance, Life—Policy—Assignment—Change of Beneficiary.

The stipulation on a policy of life insurance to the effect that its beneficiary may be changed by the insured with the written endorsement thereon by the insurer, while it is unassigned, is to protect the insurer from liability to a stranger, and has no application where the policy has been assigned to the insurer to secure a loan made to the insured and the beneficiary, and the insurer thereafter permits a change of the beneficiary to the estate of the insured, and loans an additional sum thereon, taking the policy, properly assigned, as security for the payment of the second loan, also.

2. Same—Waiver.

The stipulation on a policy of life insurance to the effect that the beneficiary may be changed, when unassigned, with the written endorsement thereon by the insurer, is one that the insurer may waive by its act or conduct, or by assenting thereto, unless it has previously been assigned to a stranger, in accordance with the policy provision, who has thereby acquired rights therein.

3. Insurance, Life—Extension Notes—Extended Insurance—Computation of Period.

Where, for the payment of a premium due on a life insurance policy, the insurer has taken the note of the insured, called a "blue note," for the difference between a cash payment and the amount due, stating that no part of the premium has been paid, but that the policy would remain in force to the due date of the note, if paid by that time, otherwise it shall automatically cease to be a claim against the maker, the company to retain the cash as part compensation for the rights and privileges thereby granted, and the rights of the insured in the policy should cease,

the payment of the cash and the giving of the note did not of itself work an extension, and its nonpayment, in accordance with its terms, renders the transaction the same as if the note had not been given; and the computation of extended insurance, in its relation to the money loaned the insured, as provided in the policy, will commence from the date the premium was due, and not from the due date of the note.

4. Insurance, Life—Loans—Premium Notes—Premiums—Extended Payments.

Where upon the face of a policy of life insurance is given nonforfeitable values for loans, the company will make and also extended insurance set opposite each successive year, these values to be proportionately reduced in the event of any indebtedness against the policy, and requiring that premiums be paid to the next succeeding date, in determining the amount of the loan on the date of application therefor, the amount set opposite the date to which the premium had been paid, is that from which the loans made upon the assigned policy must be deducted, in determining the extension value of the policy, the requirement that the premium be paid to the next succeeding date having no relation to the amount the company will lend at that time; and no loan made to the insured will be considered in such computation unless made by the insurer upon the policy as security.

5. Insurance—Policy—Contracts—Ambiguity—Interpretation.

A contract of life insurance is expressed in language selected by the insurer for its purpose, and in construing the policy all doubts as to its meaning in case of ambiguity will be resolved in favor of the insured.

6. Supreme Court Decisions—Facts.

In applying a former decision of the Supreme Court to the facts of a present case, the law will be as declared upon the facts stated by the Court in the decision referred to, in the absence of any correction of the alleged mistake by petition to rehear.

ACTION tried before *Shaw, J.*, at December Term, 1918, of GUILFORD.

The case is as follows: The policy was issued by the Greensboro Life Insurance Company, 1 August, 1905, and on 12 September, 1912, this company was merged with defendant. Nine full annual premiums were paid, the last being paid to the defendant on or about 1 August, 1913. The premium due on 1 August, 1914, was not paid in full, but $66.85 was paid upon it and a "blue note" for $96 was given, which plaintiff contends by its terms kept the policy in force until 1 February, 1915. The policy was originally payable to Ruth Underwood, daughter of insured, as beneficiary, but on 1 October, 1907, the beneficiary was changed to the plaintiff. While plaintiff was beneficiary the insured and plaintiff borrowed $385 from the Greensboro Life Insurance Company and assigned the policy sued on as security for the loan. While the policy was thus assigned to the company the assured changed the beneficiary, this time from plaintiff to his estate; and while his estate was beneficiary he borrowed sums from the Greensboro Life Insurance Com-

pany aggregating $342.29, thus bringing his total indebtedness to $727.29, which was charged against the policy, as a lien on it, in the hands of the company by assignment to it. Of this amount plaintiff signed a note for $385; and of the remaining $342.29, $162.04 was spent in paying the premiums on said policy. After the last loan was obtained by insured he again changed the beneficiary from his estate to the plaintiff.

Insured did not at any time avail himself of the privilege of taking the paid-up policy allowed him by nonforfeiture provision (2) set out below. The policy, among other provisions, contained the following:

Relevant portions of Tables A and B:

TABLE A

Nonforfeiture Values		
After end of year	Loan Value	Paid-up Policy
2	$ 165	----------
3	275	530
4	385	795
5	500	1,060
6	620	1,325
7	750	1,590
8	875	1,855
9	1,010	2,120
10	1,180	2,385

TABLE B

Nonforfeiture Values		
Ext. Ins.		After end of year
Yrs.	Mos.	
0	2	2
3	0	3
5	2	4
8	0	5
10	0	6
12	10	7
15	0	8
17	0	9
19	0	10

Tables A and B of nonforfeiture values on the margin of the page show the guaranteed values of this policy corresponding to the number of years for which full annual premiums have been paid, and in the event of any indebtedness against this policy these values will be reduced proportionately.

NONFORFEITURE PROVISIONS

(1) Loans will be made by the company in accordance with Table A upon satisfactory assignment of this policy as sole security, at a rate of interest not to exceed 6 per cent per annum, provided premiums are duly paid to the anniversary next succeeding the date when the loan is applied for.

(2) If provision (2) has not been availed of one month from default in payment of premiums, the company will voluntarily extend this policy in the first-named sum on page 1 as automatic paid-up term insurance in accordance with Table B.

Change of Beneficiary: The insured may, while this policy is in force unassigned, change the beneficiary, and such change will take

effect when endorsement thereof is made by the company upon this policy.

Assignment: No assignment of this policy shall be valid unless made in writing, and the original or a duplicate original filed in the home office of the company. The company will not be responsible for the validity of any assignment.

This policy is incontestable after one year from date except for non-payment of premiums.

On 2 September, 1914, the insured paid to the defendant $19.97 unearned interest on the loan of $727.29, as shown by article 19 of the complaint, and not denied in the answer. The insured and the plaintiff, on 21 August, 1912, executed a note to the Greensboro Life Insurance Company for $150. This note was unsecured, did not refer to the policy, nor profess to be a lien upon it, nor was the policy assigned to secure it, and was afterwards destroyed by the defendant's vice-president.

The following is a copy of note for indebtedness to the company secured by the assignment of the policy:

$727.29. No. .....

This is to certify that I, the undersigned, the insured, and beneficiary, respectively, under, and the sole owner of, Policy No. 792, issued by the Greensboro Life Insurance Company, have this day borrowed from the said company the sum of seven hundred twenty-seven and 29-100 dollars, and hereby assign the said policy and all profits and benefits now due or which may hereafter become due thereon, to secure the repayment of said loan and the interest thereon as herein provided.

The following is a copy of the "blue note":

GREENSBORO, N. C., August 1, 1914.

On or before the 1st day of November, 1914, without grace and without demand or notice, I promise to pay to the order of Jefferson Standard Life Insurance Company one hundred twenty-three 6-100 dollars, at their home office in Greensboro, N. C., with interest at the rate of 6 per cent per annum.

This note is accepted by said company at the request of the maker, together with $38.89 dollars in cash, on the following express agreement:

That although no part of the premium due on the 1st day of August, 1914, under policy No. 792-G on the life of W. I. Underwood has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had

been paid when due; that if this note is not paid on or before the day it becomes due it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made.

Judgment for the amount of the policy and interest at 6 per cent, less $150 and interest thereon and costs, from which defendant appealed.

Chas. A. Hines and Thos. C. Hoyle for plaintiff.
Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: The plaintiff contends, upon the above stated facts, that the policy was kept in force until after the death of the insured by the nonforfeiture provisions above set forth. And, for the purpose of calculating the extended insurance, she insists that the value of the policy at the end of the ninth year was $1,010, the number set opposite the figure 9 in Table A, and from this sum should be taken the amount for which the policy was liable; and she further contends that this amount was the sum of $385 (the amount of the note she signed), and $162.04 (the sums used in paying premiums on the policy), less $19.97 (the amount of unearned interest), in all $527.07. The extended insurance, as the plaintiff contends, is therefore $1,010—$527.07 of seventeen years, and should be counted from 1 February, 1915.

The defendant contends, on the other hand, that in calculating the extended insurance the value of the policy at the end of the ninth year was only $875, the number set opposite the figure 8 in Table A, and by the application of the nonforfeiture provision (1) above set forth. It also contends that $727.29 should be deducted from $875, in order that the term of extended insurance may be calculated, and that such extended insurance should be counted from 1 August, 1914, the date of the note, and not from the due date of the premium note. It is conceded by the defendant that if $1,010 was the value of the policy at the end of the ninth year (and especially if the amount of the note for $150 due the company is not to be added to the other indebtedness), it was in force at the death of the insured; and, on the other hand, plaintiff conceded that if the value of the policy at the end of the ninth year was only $875, and the debt properly chargeable against it was $727.29, then the policy had expired before the death of the insured.

The plaintiff further contends that the only amounts chargeable against the value of the policy in computing the extended insurance is $385, the original loan signed by her, and $162.04, the portions of the other loans used in paying the premiums, and from this, she contends,

should be taken $19.97 unearned interest paid to the defendant, and her reasons are as follows:

(*a*) The policy provides that the insured may, while this policy is in force and *unassigned,* change any beneficiary, and that there is no question that this policy was assigned to the company at the time when the attempted change in the beneficiary was endorsed on the policy, and therefore the attempted change was null and void, the rule of law being that where provision is made in a policy for a change of the beneficiary the right must be exercised in strict accordance with the provisions of the policy, and she cites for this position *Lanier v. Ins. Co.,* 142 N. C., 14; 14 R. C. L. Insurance, sec. 554, *et seq.;* 14 R. C. L., pages 1390-1391; and that where an insurance policy provides for a change of the beneficiary the latter has a vested interest therein subject to be divested, and then only in strict accordance with the provisions of the policy, for which contention she refers to *Deal v. Deal* (S. C.), 69 S. E., 886; *Arnold v. Ins. Co.* (Ga.), 60 S. E., 470; *Mutual Benefit v. Willoughby,* Ann. Cases, 1913, D., 828, note. And further, she contended that if the attempt to change the beneficiary from the plaintiff to the estate of the insured was a nullity, and the plaintiff continued to be the beneficiary, then loans made against the policy, evidenced by the notes which she did not sign, were invalid as to her, as "under a policy for the benefit of the wife and children of the insured, an assignment by the insured will not cut off their interest, even though it is contingent at the time the assignment is made." 25 Cyc., 778-9.

Answering this contention, it may be said that the assured had the right to change the beneficiary by designating his personal representative, for the use of his estate, as such. The policy had not been "assigned," in the sense that word is used in the contract. The assignment spoken of is one to a stranger, and not one to the company, for the latter could waive any objection to the change of the beneficiary, and did so by assenting to the one which was made in this case. Where a stranger is assignee, his rights could not materially be affected in the absence of his consent, and consequently the company, without authority for that purpose, could not waive for him. The provision was inserted to prevent confusion or complication, and to relieve the company from any danger of liability growing out of changing the beneficiary after the policy had been assigned. These reasons of course would not apply where the assignment has been made to the company itself. The debt, therefore, was $727.29, instead of $527.07, as contended by the plaintiff, and we think it was that amount, in any view, as the difference between the two was the amount of the debt contracted while the estate was assignee, and the company had the right to make the loan, notwithstanding the assignment and without the plaintiff's consent.

(*b*) The defendant admits that it did not earn $19.97 of the interest that was paid to it by the insured on 2 September, 1914, but contends that this amount should be applied on its unsecured note for $150 which it destroyed. This contention, says plaintiff, is unsound, for it is clear that this payment of unearned interest should be applied to the note upon which it was paid and reduce its amount, and she relies upon this authority for so contending: "Except when otherwise agreed, a payment made on an indebtedness consisting of principal and interest and applied by either the debtor or creditor, will be applied first to the interest due and then to the principal. Payments of interest by mistake when no interest is due is applied as payment on the principal debt at the date of maturity of the obligation. When payments of interest are made in excess of the legal interest due, the excess will generally be applied to the principal." 30 Cyc., 1249-50. "Money paid beyond lawful interest on account of the debt is in legal effect a payment upon the debt." *Loveridge v. Larned,* 7 Fed., 294.

As to the "blue notes."

(*c*) Again plaintiff insists that the "blue notes" and payments of cash in connection therewith kept the policy in force until 1 February, 1915.

We need not discuss in detail all of the questions raised on this appeal, as we are satisfied that the admission of the parties as to certain facts are sufficient for our purpose in deciding the case upon one or two grounds alone.

Our opinion is that the extension period of the insurance should be counted from 1 August, 1914. The object of the "blue note" was not to fix a new date for this purpose, that is, 1 February, 1915, but it was given by the assured and taken by the company as an accommodation or indulgence to the former, something like a grace or favor to him in the way of extended time for payment of the premium, and not as in itself a payment of the premium. If the note was not paid it was the same as if it had never been given, and there was a default in the payment of the premium as of 1 August, 1914, in which event the extended insurance would automatically start, and prevent a lapse of the policy. We have so held in a case very similar to this, and exactly the same as this case in all of the essential facts relating to this question. The Court in *Sexton v. Ins. Co.,* 157 N. C., 142 (*S. c.,* 160 N. C., 597), was called upon to construe an instrument substantially worded as is the "blue note" in this case, and it was said by *Justice Brown,* 157 N. C., 144: "There is no evidence that the defendant accepted the note as a payment for the premium. It is clearly an extension of the time of payment. In express terms the note on its face declares the policy is void if the note is not paid when due. This note is similar in language to the one construed in *Ferebee v. Ins. Co.,* 68 N. C., 11." The Court

further said, at page 145, quoting from 3 Cooley's Briefs on Insurance, p. 2269, and citing *Pitt v. Ins. Co.*, 100 Mass., 500: "It is commonly stipulated by insurance companies that if a note is accepted for a premium a failure to pay the note at maturity shall terminate the insurance. When the policy, or the policy and the note, contained a stipulation to this effect, a failure to pay at maturity a note given for a premium will work a forfeiture of insurance." See, also, *Murphy v. Ins. Co.*, 167 N. C., 334. The extension clause was inserted to save the policy from forfeiture or to prevent one. The giving of the note and payment of cash for the premium did not work an extension. The Court in *Bank of Commerce v. N. Y. Life Ins. Co.*, 54 S. E. (Ga.), 643, deciding the same question, held: "The fact that $21 was paid in cash upon the premium did not operate to extend the policy, there being in the contract nothing declaring that a payment of a part of an annual premium should give a continuation period proportionate to the fraction of the premium paid. . . . The validity of this contract cannot be successfully questioned. It did not undertake to destroy any existing right of the beneficiary under the policy. The extension of time was a favor, not a right, and the allowance of additional time for payment of a premium beyond its maturity did not operate to confer still further rights in spite of the terms of the extension." The same decision was made in *U. S. Life Ins. Co. of Portland, Me. v. Adler*, 73 N. E. (Me.), 835, and the case strongly supports this view.

But if the extended insurance began on 1 August, 1914, instead of 1 February, 1915, the policy was alive and in full force when the assured died, because when his indebtedness to the company is deducted or, rather, properly proportioned to the loan value of the policy, there is enough of the latter left to carry it beyond the day of the death. In other words, there was not enough indebtedness to have caused a lapse, or the expiration of the policy, before that event, and this is certainly true if the note for $150 is not to be counted as a part of the indebtedness.

We may well pause here to again consider the case of *Sexton v. Ins. Co., supra,* in another aspect, as defendant contends that $875 is the proper loan value of the policy and not $1,010, because in the *Sexton case* (160 N. C., 597, at 600) the Court states: "It is true the plaintiff claims that under the automatic extension feature of the policy, there having been a payment of three annual premiums, the plaintiff was entitled to an extension to the amount marked on the policy. The policy, which was in evidence, provided that the 'nonforfeiture value on the margin of this page shows the several guaranteed values of the policy corresponding to the number of years for which annual premiums have been paid, and in the event of any indebtedness against this policy

these values will be reduced proportionately.' This table shows that where three annual premiums have been paid, as in this case, the loan value was $60, which would have entitled the insured to three years and one month's extension. But it appeared in the evidence of the plaintiff that the insured had borrowed said $60 from the company, which was unpaid, and therefore, upon the plaintiff's evidence, the insured was entitled to no extension."

Defendant then says that the original record of this case shows that there had been four premiums paid instead of three, and it deduces from this fact that the court adopted the loan value of three payments, when there had been four, as it practically says should be done in this case. But that is a *non sequitur*. It does not follow that, because the court may have made a mistake as to the number of payments, it has held that defendant's contention is right as to what is the loan value, for the law is stated correctly upon the assumption that there were only three payments. "There having been payment of three annual premiums, the plaintiff was entitled to an extension to the amount marked on the policy," that is, the amount set down next opposite the figure 3, and the court so allowed, and adjudged accordingly. It is perfectly clear that the court did not mean otherwise, and that it acted upon the assumption that there had only been three premiums paid. We do not know what the record shows, or whether this was a mistake in fact, but we must take the law to be as declared upon the facts stated by the court, in the absence of any correction of the alleged mistake by petition to rehear. The parties seem to have been contented with the statement of the fact as it was made. But, however that may be, we are decidedly of the opinion that the only construction of the policy is that the figures next opposite to "nine" in the first column of the table are the correct ones to be adopted here.

If there had been no indebtedness the period of extension after eight full payments of premiums would have been fifteen years, and after nine payments it would have been seventeen years. In the former case the "loan value" of the policy would have been $875 and in the latter case $1,010. This is according to the table of values of term and paid-up policies showing the length of extended insurance in the case of the former class or term insurance. The provision as to the payment of the premium to the anniversary next succeeding the date of a loan cannot operate, by any fair or reasonable construction, to reduce the loan value of the policy to $875, as that provision was a mere condition annexed to the making of the loan, and was evidently not intended to decrease the loan value or to give any benefit by a reduction of it. It being admitted that nine annual premiums were duly and fully paid, the loan value next opposite the figure 9 must control in estimating the extension

period, as we have already shown. The result would be that the policy was in force when the assured died, but this is conclusively so when we hold, as we do, that in estimating the amount of the indebtedness the note for $150 should not be counted. It was not a lien on the policy, and the latter provides: "Tables A and B of nonforfeiture values on the margin of this page show the guaranteed values of this policy corresponding to the number of years for which full annual premiums have been paid, and in the event of any indebtedness *against this policy* these values will be reduced proportionately." This clause, especially the latter part of it, plainly shows that only indebtedness secured by an assignment of the policy shall be considered. The note of $150 was not "a debt against the policy," as contemplated by that provision.

We must not overlook the fact that, in construing a policy for the purpose of ascertaining its legal effect, the contract is expressed in language elected by the company for its purpose, and therefore that all doubts as to its meaning should be resolved in favor of the assured. *Bray v. Ins. Co.,* 139 N. C., 390; *Rayburn v. Casualty Co.,* 138 N. C., 379, 382; *Arnold v. Ins. Co.,* 152 N. C., 232; 14 Ruling Case Law, p. 226; *Grabbs v. Ins. Co.,* 125 N. C., 389, and *Bank v. Ins. Co.,* 95 U. S., 673. This Court said in *Bray v. Ins. Co., supra:* "If the clause in question is ambiguously worded, so that there is an uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. This is the rule to be adopted for our guidance in all such cases, and one reason, at least, for it, is that the company has had the time and opportunity, with a view to its own interests, to make clear its meaning, by selecting with care and precision language fit to convey it, and if it has failed to do so, the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract, as one of indemnity for his loss," citing *Grabbs v. Ins. Co.,* 125 N. C., 389. In applying this just and salutary rule, *Justice Harlan,* in *First National Bank of Kansas v. The Hartford Fire Ins. Co.,* 95 U. S., 673, 679 (24 L. Ed., 563, at 565), thus tersely and strongly restated the rule with reasons for it: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a

rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." The rule is very pertinent here, as to the several questions raised. But we entertain no doubt, without the aid of the rule, as to what the parties meant when they entered into this contract, and especially in regard to the extension clause.

It is not necessary to consider the point as to the application of the unearned interest to the debt of ($779) which is chargeable against the policy, thereby reducing it, as we are of the opinion that without making such use of it the policy had not expired at the death of the assured, but was still in force.

The case was admirably argued by both sides, and we are indebted to the learned counsel who appeared before us (Mr. Kelly and Mr. Hines) for having made easier our task in unraveling an apparently complex and intricate case by their very enlightening argument.

We have reached the conclusion that the note for $150 should be omitted from the account in ascertaining the period for the extension of the insurance under Table A, and the stipulation in the policy explanatory of it, which provides for the proportioned reduction of the policy value by the existing indebtedness. And further, that the loan value was $1,010 instead of $875. These two conclusions carry the policy beyond the death of the assured, and entitle plaintiff to recover upon it. We are also inclined to the opinion that the amount of the unearned interest should also be deducted, but it is not necessary to decide that question in view of our other holdings, and therefore leave it open.

We are of opinion that Judge Shaw gave the correct judgment, and it must be so certified.

Affirmed.

IN RE ESTATE OF R. JEFF JONES.

(Filed 15 April, 1919.)

Executors and Administrators—Administration—Letters Testamentary—Statutes—Next of Kin—Renunciation.

The widow of the deceased testator, with a life estate in her husband's personalty, qualified as his administratrix *c. t. a.*, and at her death some of his next of kin in equal degree renounced their right to administer *c. t. a. de bonis non* on his estate in favor of her brother, who was ap-

pointed by the clerk of the Superior Court. One of the next of kin of the deceased husband, in equal degree of those who had renounced, within six months after the death of the wife, petitioned for the removal of the administrator *c. t. a. d. b. n.* and applied for letters in his stead, which the clerk refused in the exercise of a discretionary power claimed by him to appoint among next of kin in equal degree: *Held*, the renunciation of some of the next of kin in equal degree with the petitioner, who has not renounced (Rev., sec. 11), could not affect his right, and the statutes on the subject of administration, chapter I, subdivisions 2 and 3 of the Revisal, distinguishes between letters of administration and letters testamentary, and applies section 3 to the facts of this case without reference to the six months limitation in section 12, whereunder the petitioner, applying within six months after the death of the administratrix, is entitled to the relief sought by him.

APPEAL by respondent, S. P. Williams, from *Lyon, J.*, at the February Term, 1919, of PERSON.

This is a contest over the appointment of an administrator *d. b. n. c. t. a.* of the estate of R. Jeff Jones.

R. Jeff Jones died in Danville, Va., in 1902, testate, leaving his estate to his wife, Lenora Jones, with the power to sell all his property and invest the proceeds in cotton mill, railroad, or bank stock, she to have the use of it during her lifetime as she wished. She qualified as his administratrix with the will annexed and wound up his estate, converting all the property into Riverside Cotton Mill stock. Mrs. Lenora Jones, said widow, soon thereafter moved to Roxboro, N. C., and resided there until her death on 5 August, 1918. She had kept the stock, amounting to $6,800 (par value), intact, only using the income.

Upon her death her brother, S. P. Williams, qualified as administrator upon her individual estate, and also applied for letters of administration, *c. t. a. de bonis non,* on the estate of R. Jeff Jones on account of said cotton mill stock, which he found in the possession of Mrs. Lenora Jones, belonging to R. Jeff Jones' estate. At that time none of the next of kin of R. Jeff Jones had applied for letters on his estate, the widow having then been dead five months.

The next of kin and distributees of R. Jeff Jones residing in this State were Hallie Jones, Reade Jones, and Mrs. Etta Chambers and Lacy Williams, and are of equal degree of kin to testator. Two nephews, Bernard Williams and Jack Jones, of same kin, are now in military service. The other next of kin are residents of Virginia.

Three of the next of kin, Hallie Jones, Reade Jones, and Mrs. Etta Chambers, renounced their right to qualify and nominated S. P. Williams, the appellant, and asked that he be appointed as administrator, and S. P. Williams, the appellant, was appointed and gave bond.

J. Lacy Williams, the only remaining next of kin residing in the State, then applied for letters and asked that S. P. Williams be removed,

and upon the hearing the clerk held "that the three next of kin having filed their renunciation and having nominated S. P. Williams, the court, in the exercise of its discretionary powers to select and appoint an administrator from among the applicants of *equal degree of kin or right to administer,* having found S. P. Williams competent and capable to perform the duties of the office," confirmed his appointment and dismissed the petition.

Upon appeal to the court in term his Honor reversed the decision of the clerk and held that J. Lacy Williams had the *right of administration in preference to respondent,* and Williams appealed.

Luther M. Carlton attorney for appellant.
F. O. Carver attorney for appellee.

ALLEN, J. Two questions are presented by the appeal:

(1) Does the provision in section 12 of the Revisal, giving discretionary power to the clerk to appoint some suitable person administrator, when no person entitled to administer has made application for letters within six months from the death of the decedent, control in an application for the appointment of an administrator *de bonis non cum testamento annexa,* made more than six months after the death of the testator and within six months of the death of the prior administrator or executor?

(2) Does the nomination of a stranger for appointment by two or more of the next of kin, entitled to administer, affect the right of another of the next of kin of equal degree who did not join in the nomination?

The statute, which confers jurisdiction on the clerk to appoint some suitable person administrator when no one entitled to administer has made application for letters within six months from the death of the decedent, is found in the second subdivision of chapter 1 of the Revisal, which is devoted to administration.

This subdivision clearly recognizes the distinction between letters of administration, which issue in case of intestacy, and letters testamentary, issuing when there is a will.

In section three it is provided that "Letters of administration, in case of *intestacy,* shall be granted to the persons entitled thereto and applying for the same in the following order," and then follows the enumeration of the classes.

Section 5. "The clerk shall not issue *letters of administration* or *letters testamentary* to any person who, at the time of appearing to qualify," is disqualified, and then the disqualifications are stated. Section 6 provides that where an executor or any person having a prior right to administer is under the disqualification of nonage or is tem-

porarily absent from the State, "such person is entitled to six months, after coming of age or after his return to the State, in which to make application for *letters testamentary* or *letters of administration.*" Section 10 makes provision for a renunciation by the *executor* and section 11 for a renunciation by those having a *prior right to administer.* (Italics ours.)

It is thus seen that throughout the subdivision the line is clearly marked between "letters of administration" and "letters testamentary" and between the executor and one entitled to administer, and this distinction is retained in sections 12 and 13, the first being entitled "when person entitled deemed to have renounced" and the second "when executor deemed to have renounced." Section 12 provides, "If any person entitled to letters of administration fails or refuses," etc. "If no person entitled to administer shall apply for letters of administration," and was intended to apply to cases of intestacy and not to those where there is a will. A consideration of the next subdivision in the chapter entitled "Will Annexed" strengthens this position because provision is made in section 14 for the appointment of an administrator with the will annexed when there is no executor qualified to act "in the order prescribed in this chapter" and not within the time.

It may be, by analogy, section 12 is broad enough to cover cases where no executor is named in the will, or when one named refuses to qualify, but primarily its purpose is to deal with cases of intestacy, and for the reason that in the vast majority of cases executors are named in wills and qualify, and comparatively few are removed by death or otherwise within six months from the death of the testator, and if it should be held that the limitation of six months applied in such cases it would be a denial of the right to administer to those placed by law in the preferred classes.

We cannot think such was the intent of the General Assembly, and are of opinion that the application for letters having been made within six months from the death of the first administrator with the will annexed, the parties should have their rights determined as regulated by section 3, which prescribes the order in which persons are entitled to administer, without reference to the limitation of six months in section 12.

Who then has the right to administer under the statute? Three of the four in the preferred class, representing a bequest of $100, have renounced and nominated S. P. Williams, a stranger, and the fourth of the class, J. Lacy Williams, representing practically one-fourth of the estate, has made application for appointment and has been appointed, and the controversy is therefore between the nominee of the

majority of the next of kin, who have very little pecuniary interest, and one of the next of kin owning a large part of the estate.

The right to nominate an administrator is recognized in several decisions in our Court, collected and discussed in *Boynton v. Heartt,* 158 N. C., 488, but in none of them has the nomination been approved or sustained when a stranger was nominated by a majority as against one in the preferred class.

The statute gives each of the next of kin in the same class the same right to administer; the interests are frequently antagonistic, as in this case, there may be no community of interest, and if numbers are permitted to control, three of the next of kin, representing a pecuniary interest of one dollar each, could name an administrator as against two entitled to one or ten thousand each.

We see no reason for permitting a majority to deprive another of his right, and the statute, Rev., sec. 11, seems to contemplate that this can only be done by his own act, by renunciation.

In Pennsylvania the register had the power of appointment, and in Stewart's Estate, 189 Pa. St., 72, the Court said of the question now before us: "The discretion vested in the register is limited to a selection from each class entitled in its order, and neither he nor the parties renouncing can pass by one of the children competent to administer and vest the appointment in a stranger. Williams' App., 7 Pa., 259; McClellan's App., 16 Pa., 110."

Again, in *Justice v. Wilkins* (Ill.), 95 N. E., 1026: "Any one of the nephews and nieces in this State, and otherwise qualified, was entitled to be appointed as administrator, and the court might have granted letters to any one or more of them. Could he legally appoint a stranger to the class, nominated by one of these nephews or nieces, unless the others who were equally entitled to administer waived their rights? We think not. In our judgment the statute is mandatory to appoint one or more of the next of kin residing in the State who were otherwise qualified, unless they waived their rights. *O'Rear v. Crum,* 135 Ill., 394, 25 N. E. 1097; *Judd v. Ross,* 146 Ill., 40, 34 N. E. 631. When any one heir of the class waives the right and nominates another, the one so nominated is not to stand in the place of the others, with equal rights to administer as against the other heirs of the class, unless the person nominating is the only heir of that class. If all of those who appear of the class entitled to administer waive that right and another person is appointed at his, her, or their request, if one of the others of the class who are equally entitled to administer appears 'within sixty days from the death of the intestate' and insists upon his right to administer in person, and if he is a competent person, we are of the opinion that it would be the duty of the court to appoint him; provided, however, in

turning over the estate the court may make all necessary orders for its proper protection and for the compensation of the person theretofore appointed."

"Code Civ. Proc., 1365, in fixing the order in which certain classes of persons are entitled to administer a decedent's estate, provides (subdivision 2) that in the absence of a surviving husband or wife, children shall be appointed. Section 1379 provides that 'administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court': *Held,* that where three daughters survived, and one of them applied for administration, she should be appointed, though a competent person nominated by the other two daughters also applied, the court not having any discretion in such case." *In re* Meyers Es. (Cal.), 100 Pac., 712.

The same principle is declared in *Cramer v. Sharp,* 49 N. J. Eq., 558.

We are therefore of opinion his Honor committed no error in holding that J. Lacy Williams is entitled to the appointment as administrator *d. b. n. c. t. a.* in preference to S. P. Williams, a stranger.

No error.

J. C. HILTON v. H. W. GORDON ET ALS.

(Filed 23 April, 1919.)

1. Limitation of Actions—Deeds and Conveyances—Contracts—Accounting—Demand—Trusts—Principal and Agent.

Under a valid contract that the grantee of lands pay one-third of the rents and profits to a prior encumbrance thereon until he be paid in full, and then reconvey a certain part thereof to his grantor: *Held,* the relation of the parties is one of trust and agency, during the continuance of which the grantee's possession is not inconsistent with the grantor's right of title, and the grantor's demand for an accounting and deed during that time is not sufficient to set the statute of limitation in motion in the grantee's favor, especially when no reply to the demand had been made, or the demand refused, and the grantor was not made aware of the status of the account until action was brought.

2. Appeal and Error—Reference—Findings—Evidence.

The findings of facts by the referee, supported by evidence, and approved by the trial judge, are not reviewable on appeal.

APPEAL by defendant from *Shaw, J.,* from GUILFORD. Term of court not stated in record.

HILTON *v.* GORDON.

This is an action tried upon exceptions to the report of a referee. The action was begun 1 April, 1914. The plaintiff alleged that on and prior to 29 April, 1889, he was the owner of a tract of land in Guilford County (described in the complaint) containing one hundred and ninety-two acres, upon which there was a mortgage of eight hundred and ten dollars ($810); that on 29 April, 1889, the plaintiff and H. W. Gordon entered into a certain written contract whereby it was agreed that the plaintiff should convey said land to H. W. Gordon, who was to hold, use and cultivate the same and apply one-third of all crops, profits, and income from said land to pay off said mortgage, and to hold and cultivate said land until one-third of the income or profits should be sufficient to pay off said mortgage, the said Gordon to have the other two-thirds of the income arising from the cultivation of the land; that said deed was executed to H. W. Gordon by plaintiff on 29 April, 1889, and H. W. Gordon thereupon executed a written contract to the effect above mentioned, and that H. W. Gordon and his wife, Mary Gordon, by the terms of said contract agreed to reconvey to the plaintiff one-half of the said tract of land (ninety-six acres) as soon as one-third of the profits and rents of the whole tract (one hundred and twenty-two acres) should discharge the said mortgage debt; that thereupon H. W. Gordon went into possession of the said land and has ever since continued in possession, and has had and received all the rents and income therefrom and has never accounted to the plaintiff for any part thereof; that one-third of the rents has been more than sufficient to pay off said mortgage before the beginning of this action.

The findings by the referee, which were approved by the court, are in accordance with these allegations of the complaint, and in addition it was found as a fact that the rents were sufficient by December, 1907, to pay the mortgage debt, but that the defendant rendered no accounts of the rents and contended up to the commencement of this action that the mortgage debt had not been paid, and it was also found as a fact that the plaintiff did not know until after the commencement of this action that the rents were sufficient for that purpose.

In April, 1892, the plaintiff wrote a letter to the defendant in which he said, among other things: "The deed to that land is due soon and you will please have it run out according to contract, and write me when it will be ready. I want it fixed some way or other. John Barringer told me that it was fixed so you could not have a good deed till that firm would take the money; that you could give me a deed subject to that debt. I want it fixed right. If you can't make a good deed until that money is paid you can renew the title. If you will work it as you have before and appropriate one-sixth of all the truck that you make on the entire place, you write me how much my rent paid on my part and how

much is due yet. I am ready to pay off the whole thing any time you can make the deed."

The defendant made no reply to this letter, and at that time the plaintiff was not entitled to a deed because the rents were not then sufficient to pay off the mortgage debt.

Judgment was rendered upon the report of the referee, which was approved by the court, requiring the defendant to execute a deed according to his contract and for the rents over and above the mortgage debt, and the defendant excepted and appealed.

King & Kimball, attorneys for plaintiff.
J. A. Barringer and R. C. Strudwick, attorneys for defendant.

ALLEN, J. The exception relied on by the defendant is to the judgment, upon the ground that, although under the agreement and contract found by the referee to exist between the plaintiff and defendant, the relationship of trustee and agent existed, the letter written by the plaintiff to the defendant in April, 1892, was a demand, and had the effect of putting the statute of limitations in operation, and that upon the admitted facts the plaintiff's cause of action is barred.

There are, in our opinion, several satisfactory answers to this position.

Speaking of a contract similar in many respects, but not with so many evidences of a trust, the Court said, in *Maxwell v. Barringer,* 110 N. C., 83: "The defendant was the trustee of an express trust, and also an equitable tenant in common with the plaintiffs. His possession was not inconsistent with his relation to the plaintiffs, and there was no actual ouster or exclusive possession for twenty years. *Gilchrist v. Middleton,* 107 N. C., 681. Treating him either as a trustee or a tenant in common, the statute would not be put in operation until a demand and refusal." And again in *Patterson v. Lilly,* 90 N. C., 88: "It is true a demand was made by the plaintiffs in 1873, but there was no refusal; and a demand and refusal were necessary to terminate his agency. In *Northcott v. Casper,* 6 Ired. Eq., 303, *Chief Justice Ruffin* said: 'If there be an express understanding by one to manage an estate for another, for an indefinite period, a right to an account arises between them from time to time, but the statute of limitations does not operate to bar an account for any part of the time while the relation of principal and bailiff subsists between them, that is, while the agency of the management of the estate is kept up. While the relation continues there is a privity between the parties, and there is nothing to set the statute in operation': and it was held in that case that a demand and refusal were necessary to put the statute in motion. And in *Comrs. v. Lash,* 89 N. C., 159, it was held that where the relation of principal and agent

subsists, the demand for an account necessary to put the statute of limitations in operation must be such as to put an end to the agency. Nothing less than a *demand and refusal,* or the coming to a final account and settlement, or the death of one of the parties, will put an end to an agency."

The defendant, instead of refusing to comply with the request in the letter, paid no attention to it, and continued the use and occupation of the land under the contract as before. He neither did nor said anything in repudiation of the trust, or to create an adverse relationship, and the defendant testified that no demand was made on him after the letter was written, and up to action commenced he was contending he had the right to use the land under his contract with the plaintiff, which he, however, denied was the contract declared on, upon the ground that he had not received sufficient rents to pay off the mortgage debt.

Again, the cause of action of the plaintiff had not accrued in 1892, and the defendant might have refused to make a deed to the plaintiff at that time without assuming a hostile attitude, upon the ground that he was in possession under the contract, and that the plaintiff would not be entitled to a deed until the rents were sufficient to pay the mortgage debt, which was not until 1907, fifteen years after the letter was written.

The trust or agency was continuous, unfinished, and indefinite as to time, and as said in *Comrs. v. Lash,* 89 N. C., 168: "The cases in which a demand is held to be necessary, and when made to put the statute in motion, will be found to be concluded or finished agencies, where nothing remains to be done but to account for and pay over the fund. They are inapplicable to a continuous indefinite agency in which, from the confidence reposed in the agent, he assumes fiduciary relations towards his employer in the management of interests committed to his charge and becomes a trustee. While this *relation subsists,* though there may have been unheeded calls on him for information, by the mutual acquiescence of the parties, it cannot be hostile so as to permit the running of the statute.

"Where the agent becomes a trustee, charged with the execution of fiduciary duties, until the trust is put an end to, the statute does not begin to operate. In express trusts there is no bar until a sufficient time lapses after their close. This is decided in numerous cases. *Falls v. Torrence,* 11 N. C., 412; *Edwards v. University,* 21 N. C., 325. The same is the rule as to a bailee. *Collier v. Poe,* 16 N. C., 55.

"Thus *Pearson, J.,* remarks: 'Where a confidential relation is established between parties, either by act of law as in the case of copartners, tenants in common, etc., or by agreement of the parties themselves as in case of a trust or *agency,* the rights incident to that relation continue

until that relation is put an end to, and *the statute of limitations and lapse of time have no application.' Blount v. Roberson,* 56 N. C., 73.

"To the same effect, as to an unclosed trust, are *Davis v. Cotton,* 55 N. C., 430; *West v. Sloan,* 56 N. C., 102."

We therefore conclude that the letter of 1892, requesting the execution of a deed, did not have the effect of putting the statute of limitations in operation, and as the defendant continued in possession, claiming up to the commencement of this action that the rents were not sufficient to pay off the mortgage, and had never made a statement of the accounts between them, and the plaintiff was ignorant of his rights, that the plaintiff's cause of action is not barred.

The other exceptions of the defendant are to findings of fact, which are supported by evidence, and the action of the court thereon is not subject to review. *Spruce Co. v. Hayes,* 169 N. C., 254.

Affirmed.

CRANE COMPANY v. LONGEST & TESSIER COMPANY ET AL.

(Filed 23 April, 1919.)

1. **Pleadings—Demurrer.**

The allegations of the complaint are admitted upon demurrer and liberally construed in favor of the pleader.

2. **Contracts—Interpretation—Insurance—Principal and Surety.**

Doubtful and ambiguous expressions in a contract of indemnity or insurance are given a reasonable construction in favor of the insured.

3. **Principal and Surety — Bonds—Indemnity—Material Men—Laborers—Guarantor of Payment.**

An indemnifying bond given to an incorporated town or city for the erection of a building providing for the payment of "all persons who have contracts directly with the principal for labor and material," etc., includes within its intent and meaning a material account furnished to a sub-contractor under a guarantee of payment by the principal contractor, and also comes within the express terms of the written contract stipulating to "satisfy all claims and demands incurred," meaning those incurred in securing labor and material for the building.

4. **Contracts—Guarantor of Payment—Liability.**

A guarantor of payment assumes an absolute and direct liability upon the failure of the principal to pay the amount as guaranteed, therein differing from a guarantor for collection, whose promise is to pay upon condition that the one thus indemnified shall diligently prosecute the principal debtor without success.

APPEAL by United States Fidelity and Guaranty Company from *Lane, J.,* at the February Term, 1919, of GUILFORD.

This is an appeal from an order overruling a demurrer to the complaint.

The first three allegations in the complaint allege the incorporation of the plaintiff and of the defendants, Longest & Tessier Company and the United States Fidelity and Guaranty Company.

The other allegations in the complaint are as follows:

4. That on the 10th day of July, 1918, the defendant, Longest & Tessier Company, entered into a written contract or agreement with the County Commissioners of Surry County, North Carolina, for the construction of a courthouse and jail at Dobson, N. C., and such commissioners, complying with the Public Laws of North Carolina, session 1913, chapter 150, section 2, or Revisal, section 2020, of 1905, as thereby amended, demanded that the said defendant, Longest & Tessier Company, give bond as required by such statute.

5. That on the 12th day of July, 1918, the defendant, United States Fidelity and Guaranty Company, of Baltimore, Md., for value received, together with its codefendant, Longest & Tessier Company, complying with the demand of the County Commissioners of Surry County, N. C., made, executed, and delivered a bond to the said County Commissioners of Surry County in the sum of twenty-four thousand five hundred dollars ($24,500), the condition thereof being as follows:

That if the principal (Longest & Tessier Company) shall faithfully perform the contract on its part, and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner (County Commissioners of Surry County) from all costs and damages which he may sustain by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expenses which the owner (County Commissioners of Surry County) may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

6. That on the 21st day of October, 1916, the defendant, Longest & Tessier Company, made, executed, and delivered to the plaintiff, Crane Company, a contract for materials to be used in the construction of the Surry County courthouse and jail, such contract being in words and figures as follows:

GREENSBORO, N. C.

CRANE COMPANY,

Baltimore, Md.

DEAR SIRS:—Please sell and deliver to Comstock Electric Company, Inc., High Point, North Carolina, on your usual credit terms of sixty days net or two per cent for cash, ten days from date of invoice, goods, wares, and merchandise not to exceed $2,044.91 (two thousand and

forty-four dollars and ninety-one cents), being quotations for material selected and ordered by the above Comstock Electric Company, Inc., for Surry County courthouse and jail contract at Dobson, North Carolina, and in consideration thereof we hereby guaranty and hold ourselves personally responsible for the payment at maturity for goods, wares, and merchandise so sold and delivered. We hereby waive notice of acceptance thereof, dates of shipment or delivery and notice of default in payment.

Witness our hand and seal, this ..... day of ....., 1916.

Yours truly,

LONGEST & TESSIER COMPANY,

By E. D. Tessier, Treas.

And accompanied said contract with its letter hereto attached, marked "Exhibit B," and made a part hereof.

7. That after the execution of the foregoing contract of 21 October, 1916, and in compliance with the terms thereof, the plaintiff delivered to the said Comstock Electric Company, goods, wares, and building material in the sum of $1,224.04, an itemized statement of which is hereto attached, marked "Exhibit A," and asked to be taken as a part of this paragraph; that all of said materials were used by the said Comstock Electric Company in attempting to carry out the terms of its agreement with Longest & Tessier Company in the erection of the Surry County courthouse and jail, which the said Longest & Tessier Company contracted to build for the commissioners above named by the terms of its agreement, dated 10 July, 1916, and that all of the materials, an itemized statement of which is set out in "Exhibit A," were used in the construction of said courthouse and jail. (Omitted from record by agreement.)

8. That before the said plumbing contract of the Comstock Electric Company with Longest & Tessier was completed the said Comstock Electric Company abandoned the said contract, and failed and neglected to finish the work; that thereupon the said Longest & Tessier Company took the materials which the plaintiff had shipped to be used in the construction of said Surry County courthouse and jail, and undertook the completion of the contract which the said Comstock Electric Company had abandoned, but that before it could complete the same and before it could carry out its agreement with the County Commissioners of Surry County, dated 10 July, 1916, and before it could comply with the terms of its guaranty with the plaintiff, as above alleged, the said defendant, Longest & Tessier Company, became insolvent and was duly adjudged a bankrupt on the 29th day of May, 1917.

9. That the plaintiff is informed and believes, and so alleges, that by

reason of the bond executed by the United States Fidelity & Guaranty Company, of Baltimore, Md., to the County Commissioners of Surry County, for the benefit of Longest & Tessier Company, and by reason of the guarantee executed by the said Longest & Tessier to the plaintiff, the said United States Fidelity and Guaranty Company, of Baltimore, and its codefendant, Longest & Tessier Company, became liable to the plaintiff for the amount due the said plaintiff for materials furnished by virtue of said guarantee, to the Comstock Electric Company, to be used in the construction of the Surry County courthouse and jail, and that by reason of said bond and guarantee, and the contracts hereinbefore mentioned, the defendants are due and owing the plaintiff the sum of $1,224.04, with interest thereon from 2 February, 1917, until paid.

10. That said Longest & Tessier Company is due and owing the plaintiff the sum of $1,224.04 as a balance remaining for materials furnished by the plaintiff to the Comstock Electric Company, to be used in the construction of the Surry County courthouse and jail, under and by virtue of the terms of its guarantee to the plaintiff, as hereinbefore alleged.

Wherefore, plaintiff prays for judgment against the defendants and each of them for the sum of $1,224.04, with interest thereon from 2 February, 1917, together with the costs of this action, to be taxed by the clerk.

CLIFFORD FRAZIER,

Attorney for Plaintiff.

The demurrer is as follows:

The United States Fidelity and Guaranty Company, one of the defendants above named, demurs to the complaint filed in this cause on the following ground:

That it appears from the complaint, and upon the face thereof, that the said defendant is not liable to any person for labor or material used in the construction of said Surry County courthouse unless the same is due upon a contract made directly with the said Longest & Tessier Company, and that the contract sued on in this case was not made directly with said Longest & Tessier Company, but that the goods sued for in this case were sold by the plaintiff directly to the Comstock Electric Company and delivered to said Comstock Electric Company.

JNO. L. RENDLEMAN,
JEROME & SCALES,
Attorneys for Defendant,
United States Fidelity and Guaranty Company.

The demurrer was overruled, and the defendant guaranty company excepted and appealed.

Clifford Frazier, attorney for plaintiff.
John L. Rendleman and Jerome & Scales, attorneys for defendant.

ALLEN, J. The demurrer is based upon that part of the bond in which the defendant agrees that it "shall pay all persons who have contracts directly with the principal for labor or materials," the defendant surety company contending that the plaintiff did not furnish the material, for which recovery is sought, by contract directly with Longest-Tessier Company, the principal, but that the contract of sale was with the Comstock Electric Company.

The allegations of the complaint are admitted by the demurrer, and they must be liberally construed in favor of the pleader. *Brewer v. Wynne,* 154 N. C., 471.

It is also a correct rule of construction, as insurance contracts are prepared by the insurer, that doubtful and ambiguous expressions will be construed in favor of the insured, if this can reasonably be done. *Grocery Co. v. Casualty Co.,* 157 N. C., 116.

Applying these principles, it seems to us clear that the claim of the plaintiff is protected by the bond of the defendant.

The materials furnished by the plaintiff were ordered by the electric company, but there is no allegation that the order was accepted; and, on the contrary, it appears that there was no sale until the principal gave its guaranty, and this is a guaranty of payment, which imposes an absolute and direct liability and not a guaranty of collection.

As said by *Shepherd, J.,* in *Jenkins v. Wilkinson,* 107 N. C., 707, and approved in *Voorhees v. Porter,* 134 N. C., 600: "There is a plain distinction between a guaranty of payment and a guaranty of collection. 'The former is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.' *Jones v. Ashford,* 79 N. C., 173; Baylie's Sureties and Guarantors, 113."

If, therefore, the liability of the defendant was dependent on the language quoted and relied on, we would not hesitate to hold that the allegations of the complaint bring the claim of the plaintiff within the class of contracts for materials made directly with the principal, but the obligations of the bond are broader than this as it is expressly stipulated to "satisfy all claims and demands incurred for the same," meaning the claims and demands incurred in securing labor and material for building the courthouse, and the allegations of the complaint show that the material furnished by the plaintiff was used for this purpose.

Affirmed.

REIDSVILLE PAPER BOX COMPANY v. SOUTHERN RAILWAY.

(Filed 23 April, 1919.)

Carriers of Goods—Connecting Carriers—Delivering Carrier—Damages—Evidence—Trials.

Evidence tending to show that the delivering carrier of a connecting line of carriers over whose lines a shipment of goods had been transported from another State for delivery here had received from the consignee the amount of freight charged for the entire routing over the various lines, is sufficient to take the case to the jury in the consignee's action against the delivering carrier for damages. The question of the carrier's liability under the principles of principal and agent, and under the Carmack amendment to the Federal statute, discussed by CLARK, C. J.

WALKER and ALLEN, JJ., concur in result; BROWN, J., not sitting.

APPEAL by defendant from *Lane, J.*, at November Term, 1918, of ROCKINGHAM.

This action was begun before a justice of the peace to recover $81.60, the value of a box of braid "short" in a shipment from Fall River, Mass., to Reidsville, N. C., and $1.10 freight thereon paid by the plaintiff, to the defendant at Reidsville, N. C.

On appeal to the Superior Court the jury rendered a verdict for the same amount. Appeal by defendant.

J. M. Sharp for plaintiff.
Manly, Hendren & Womble for defendant.

CLARK, C. J. The shipment in question was made by the Hooper Sons Manufacturing Company from Fall River, Mass., to the plaintiff at Reidsville, N. C. The defendant presented a bill for the freight for the entire shipment and received payment therefor, including $1.10 freight on the shortage. On notice the defendant was required to produce the receipted freight bill. This had thereon a notation showing the shortage of one box of tape, which was checked "short at pier 14 N. R." The evidence that the shortage on the said shipment was in value $81.60 was not contradicted. Indeed, the defendant introduced no evidence, and the only question presented by the appeal is whether upon the evidence the case should have been submitted to the jury.

When the initial carrier at Fall River gave the through bill of lading for the goods to be delivered at Reidsville, it was acting not only on its own behalf, but as agent for all the carriers (which are usually named on the bill of lading) through whose hands the shipment would pass, and obligated for itself and for them its safe delivery at Reidsville, N. C. *Mills v. R. R.*, 119 N. C., 693, and citations in Anno. Ed.

When the defendant, the last carrier, presented the freight bill and receipted the same, it did so as agent not only for itself but for the entire chain of carriers from Fall River, among whom the freight charged was to be apportioned.

In the early days of transportation by rail a passenger bought his ticket over each successive line, and there were no through tickets, but the pressure of business and the necessity of the economy of time of the passenger, and economy on the part of the railroad companies, by selling one ticket instead of a new ticket at the initial point of each railroad, necessitated a change. There being no uncertainty as to the company by which a passenger sustains injury there has been no modification by which the initial carrier has been made responsible for personal injuries to a passenger. But as to the shipment of freight, whose volume has been enormously increased, the course of dealings is that the initial carrier assumes for itself and all others on the through bill of lading liability for its safe delivery, and this has been recognized by the Carmack amendment which authorizes action for loss or damage to goods in transit against the initial carrier, and the courts in all the more recent decisions have recognized that a through bill of lading is in effect a joint contract upon which any one of the lines embraced in the contract of carriage can be sued, and recovery had against such corporation.

This has become a necessity in the present enormous development of through transportation by rail and steamer lines. It would be impracticable to require a shipper to sue the initial carrier and upon the finding by a jury that the loss was not sustained on that line to sue in succession each of the companies composing the through line over which the shipment passed. This would be a *reductio ad absurdum.*

The various companies which compose, *pro hac vice,* the "through line" over which any shipment passes, make a joint contract for their own convenience, or it may be a *quasi* partnership for the occasion, by which the bill of lading is given at the point of origin for the receiving company on behalf of itself and as agent for all the others down to the place of destination, and on this joint contract any company in such line of through traffic can be sued. *Gilikin v. R. R.,* 174 N. C., 138. Upon proof of loss or nondelivery, the means are within the knowledge of the carriers, and not accessible to the shipper, by which the default can be readily traced and placed upon the particular company liable therefor, and the loss adjusted in the settlement of the through traffic accounts of these corporations. *Gallop v. R. R.,* 173 N. C., 21.

So, in like manner, whether the receiving company or the company delivering the goods receipts for the freight, it is a discharge of the shipper binding on all the companies, and if there is a shortage in such

delivery, action can be brought against any company represented by the bill of lading or in the freight receipt. The company liable for the damage or shortage will be ascertained by the common traffic manager, and in the settlement of the through traffic passing over their lines, the carrier responsible will be charged up with the loss.

Any other arrangement would be impractical in the present enormous development of through traffic. The defendant relies upon the head-note in *Insurance Co. v. R. R.,* 104 U. S., 146, decided in 1881, that "in the absence of a special contract, express or implied, for the safe transportation of goods to their known transportation, the carrier is only bound to carry safely and deliver to the next carrier in the route"; but the decision in that case states that the facts found were that there was no through bill of lading and the bill of lading specified that the receiving company should not be held liable for any damage or deficiency beyond its terminus. In *Myrick v. R. R.,* 107 U. S., 102, it is also expressly provided in the bill of lading that "the company will not be liable or responsible for any loss, damage, or injury to the property when the same shall have been sent from any warehouse or station of the company." *Judge Field* says "The receipt does not on its face import any bargain to carry the freight through."

The defendant also relies upon *McGuire v. R. R.,* 153 Federal, 434, which holds that the fact that the destination of a shipment is beyond the line of the receiving company, "does not create any joint responsibility between the connecting carriers where the shipment over each is under a separate contract which limits the liability for loss or injuries to such as may occur on its own line." These cases, therefore, do not apply, for it does not appear that there is any such restriction in the bill of lading in this case.

If there were such restriction it is now invalid under the Carmack amendment, section 8604a U. S. Comp. Stat., 1918, which authorizes action in such cases against receiving carrier, which is given its remedy over against the carrier causing the loss. *Ib.,* 8604aa. It may very well be doubted if under the sharp competition between rival lines in these days (until the recent assumption of governmental control) a through bill of lading with such restrictions (even if valid) would be accepted by shippers with the almost utter impossibility of shippers ascertaining and fixing the loss upon the proper carrier in case of damage or loss. The liability exists in spite of any agreement to the contrary, and even when there is no bill of lading. *R. R. v. Riverside Mills,* 219 U. S., 186; 31 L. R. A. (N. S.), 7, and notes. There is a presumption that the terminal carrier who delivers the freight short or in bad order is liable. See notes to *R. R. v. Riverside Mills,* 31 L. R. A., at p. 106. The defendant offered no evidence to rebut this presumption.

It was under and by virtue only of this being a joint contract binding upon the defendant, and in recognition and ratification of its liability thereunder, that the defendant undertook to carry over its line and deliver this shipment to the plaintiff and to collect freight therefrom for the entire transportation from Fall River.

The through bill of lading and the receipt for the through freight by the defendant are evidence of the joint-contract, *Mills v. R. R.,* 119 N. C., 693, and citations thereto in Anno. Ed., and it was not error in the absence of all evidence to the contrary to instruct the jury that "If they believed the evidence to answer the issue in favor of the plaintiff." There was no controversy as to the value of the goods lost and of the amount of freight paid thereon.

The appellant, both in his brief and argument, presents only his right to a nonsuit. Consequently his exception to the charge is abandoned. Rule 34, 164 N. C., 551. The testimony therefore must be taken in the light most favorable to the plaintiff. *Hopkins v. R. R.,* 131 N. C., 463. And upon the evidence a reasonable inference arises that the initial carrier was the duly authorized agent of the other carriers through to the point of destination, upon the joint-contract arising upon the bill of lading.

No error.

T. C. WAGSTAFF v. CENTRAL HIGHWAY COMMISSION OF PERSON COUNTY.

(Filed 23 April, 1919.)

1. Statutes—Amendments—Constitutional Law—Bond Issues—Taxation—Counties.

Where the constitutional requirement that an act providing for the creation of a county debt and the levy of a tax, etc., shall be passed upon its various readings on separate days, with the "aye" and "no" vote taken, has been complied with by the Legislature, an amendment, which had not met this requirement but which does not increase the amount of the debt or the taxes to be levied or otherwise materially change the original bill, is also valid and constitutes a portion of the law without the observance of these formalities.

2. Same—Highways—Public Roads.

Where an act submitting the question of bonds for the construction and maintenance of the public highways of a county to the qualified voters therein has been passed on the several days with "aye" and "no" vote taken, as required by the Constitution, Art. II, sec. 14, stating that the highway commissioners of the county shall retire the bonds at certain intervals within a period of forty years, but expressly leaving this discretionary with them within the forty years, and subsequently, but before the issuance of the bonds, the act was amended by the Legislature

without observing these provisions of the Constitution, making the interest on the bonds payable semi-annually instead of on 1 July and January of each year, and leaving it absolutely discretionary with the said commissioners to determine the maturity of the bonds in series within the forty years: *Held*, the amendment did not change the material portions of the original bill, which met the constitutional requirements, and the amendment should be incorporated therein as a valid law.

3. Constitutional Law — Equation — Poll Tax — Property Tax—Statutes—Special Tax—Highways—Public Roads.

The equation between the property and poll tax fixed by section 1; Article V of our Constitution, refers to the ordinary general tax for state and county purposes, and has no application to a special act of the Legislature passed in conformity with Article II, section 14 thereof, submitting the question of bonds and taxation to the qualified voters of the county for the special purpose of constructing and maintaining its public roads.

CLARK, C. J., concurs in part.

CONTROVERSY without action, heard before *Lyon, J.*, holding courts of Tenth Judicial District, Spring Term, 1919, of PERSON.

The controversy is to determine the right of the defendant, the Central Highway Commission, to issue bonds of the county of Person for the construction and maintenance of the public highways therein, pursuant to chapter 74, Public-Local Laws 1919, as amended by the Laws of 1919, and to the issuance of an injunction to restrain the said proposed bond issue.

There was judgment for defendant, and plaintiff excepted and appealed.

C. A. Hall for plaintiff.
F. O. Carver for defendant.

HOKE, J. Chapter 74, Public-Local Laws 1917, establishes a general scheme for the construction and maintenance of the public roads of Person County, creates a Central Highway Commission with power to supervise and control the matter, authorizes a bond issue, not to exceed $300,000, on approval of a majority of the votes cast at an election to be held for the purposes, and the laying of a tax, not to exceed 50 cents on the hundred dollars valuation of property and one hundred and fifty on the poll, to meet the interest and provide a sinking fund, the latter not to exceed 1 per cent on the entire issue; and the commission is authorized, in its discretion, to use any of the sinking fund for the purchase in open market of any of the bonds issued under the act, which said bonds are to run for a period not exceeding forty years from the date of issue. An election having been held and the bond issue approved

by the voters, the act, in reference to the form of the bonds and the times when the same might be made to mature and when the current interest thereon paid, provides as follows: "The bonds so issued shall bear interest at the rate of not to exceed 5 per cent, payable the first day of July and January of each year, and shall run for a period not exceeding forty years from date of issue. The said Central Highway Commission may provide for the retirement of seventy-five thousand dollars of said bonds at the end of ten years after date of issue, seventy-five thousand dollars at the end of twenty years, seventy-five thousand dollars at the end of thirty years, and the other seventy-five thousand dollars at the end of forty years, all of this to be in the discretion of the Central Highway Commission."

This statute was regularly passed, pursuant to Article II, section 14 of the State Constitution, which requires that, in order to the validity of a law of this kind, "The bill shall be read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal." Before any bonds issued the General Assembly of 1919 amended this portion of section 2 of the original law, the amendment being in terms as follows:

"The General Assembly do enact: That section two of chapter seventy-four of Public-Local Laws of one thousand nine hundred and seventeen be and the same is hereby amended by striking out the words 'the first day of January and July of each year,' in line thirty thereof, and inserting in lieu thereof the word 'semi-annually.' And by striking out all of said section after the word 'issue,' in line thirty-one thereof, and inserting in lieu thereof the following: 'The said bonds may be made to mature in series at such time or times as the Central Highway Commission may in its discretion determine, it being the intent of this act to confer upon said Central Highway Commission full power and discretion to provide for the retirement of said bonds so sold by it in such amounts and at such time or times as it may prescribe within forty years from the date of the issue.'" That, under the powers conferred by these statutes and approved in the election, as stated, the Central Highway Commission of Person County proposes to issue and sell the coupon bonds of the county, to the amount of $225,000, bearing interest at the statutory rate and to mature as follows:

$15,000 maturing in 5 years from date of issue
$20,000 maturing in 10 years from date of issue
$25,000 maturing in 15 years from date of issue
$35,000 maturing in 20 years from date of issue

$45,000 maturing in 25 years from date of issue
$55,000 maturing in 30 years from date of issue
$30,000 maturing in 33 years from date of issue

That the amendment to said act was not passed pursuant to Article II, section 14, and the question presented is as to the validity of the proposed issue. In various decisions of the court, construing this section of the Constitution, it has been held that when the original act, providing for the creation of a debt and the levy of a tax, etc., has been passed, pursuant to the constitutional requirements, that an amendment thereto, which does not increase the amount of the debt or the taxes to be levied or otherwise materially change the original bill, will be valid and constitute a portion of the law without the observance of the formalities referred to. *Gregg v. Comrs.,* 162 N. C., p. 479; *Comrs. v. Stafford,* 138 N. C., p. 453; *Brown v. Stewart,* 134 N. C., p. 357; *Glenn v. Wray,* 126 N. C., p. 730. Considering the record, in view of these decisions and others of like kind, we do not hesitate to hold that the amendment, the subject-matter of this controversy, makes no material change in the original statute and that the bond issue referred to will be in all respects valid.

It would not be seriously contended, in reference to the payment of the interest, that the change, making same due semi-annually instead of the first of July and January of each year, has any appreciable significance, and as to the tentative scheme submitted for the maturing of the bonds in successive periods of five, ten, fifteen years, etc., the time limit of forty years for the bond issue, contained both in the original act and the amendment, has not been passed. Neither the amount of the debt nor the rate of taxation has been exceeded. As stated in the well-considered argument of defendant's counsel, the sinking fund provision, limited to 1 per cent on the entire issue, would be more available and effective by reason of proposed method, and the burden on the taxpayer would seem to be made lighter rather than increased; but, apart from this, and we prefer to rest our decision on this ground, we are clearly of opinion that both in the original act and in the amendment the time for maturing and retirement of these bonds was left in the discretion of the Central Highway Commission, subject to the limitation that the issue should, in no event, exceed the period of forty years from the date of issue. On the question directly presented, while the original act, more by way of suggestion than requirement, provides that the commission may retire $75,000 of bonds at the end of ten years, $75,000 at the end of twenty, etc., and while the term "may" is usually construed as "shall" when a public duty is imposed upon a public official, *Jones v. Comrs.,* 137 N. C., p. 579, the portion of the law in question here closes with the very significant and, to our minds, controlling

provision that "All of this to be in the discretion of the Central Highway Commission." And the amendment, in striking out this part of section 2 and substituting for it the provision leaving the matter in the power and discretion of the commission, had no sensible effect upon the original statute. The amendment was no doubt enacted to put at rest some question that had been raised concerning it and, in our opinion, made no appreciable change from the original law.

This disposes of the only exception appearing in the record. In regard to the effect of section 1, Article V of our Constitution, on the issue presented, that which establishes a limit of taxation on the poll and property and a fixed equation between them, as the question has been otherwise mooted, we consider it well to say that under authoritative construction dealing directly with the subject this section of the Constitution refers to the ordinary general taxation for state and county purposes, and has no application to taxation of this kind, which is for a special purpose, entered on with the special approval of the General Assembly, and which, in this instance, has also the sanction and approval of the popular vote. *Moose v. Comrs.*, 172 N. C., 419.

There is no error in the judgment of his Honor, and the same is Affirmed.

CLARK, C. J., concurs in the opinion and the result, except as to the validity of the levy of a poll tax for the purpose of issuing bonds for the construction of public roads.

The Constitution, Art. V, sec. 1, provides: "The State and county capitation tax combined shall *never* exceed $2 on the head," and Article V, section 2, provides: "The proceeds of the State and county capitation tax shall be applied to the purpose of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose." The poll tax ($1.50) laid in this act is in excess of the $2 which is already levied in Person County, and is beyond the limit permitted by the Constitution, which not only gives the explicit pledge to laborers and men of small means that they should not be taxed for the mere privilege of breathing the air more than $2 per year, but that that sum should be applied to no other purposes than "education and the support of the poor."

These two sections cannot be stricken from the Constitution. They could not be made more explicit. The whole subject was thoroughly reviewed and this view sustained by the unanimous opinion of this Court by *Connor, J.*, in *R. R. v. Comrs.*, 148 N. C., 220, where the court said that the provision was "imperative and prohibits the levy of any tax upon the poll for any purpose in excess of that sum; and applies the poll tax to the purposes of education and the support of the poor, and

. . . withdraws it for any other purpose," adding, 148 N. C., 245: "This question cannot again arise."

This opinion was repeated in *R. R. v. Comrs.*, 148 N. C., 248, also written by *Judge Connor*, and in *Perry v. Comrs.*, 148 N. C., 521, by *Hoke, J.*

In this view, the issuance of the bonds is valid, but so much of the act as levies a poll tax for this purpose should be disregarded. The holders of the bonds have the right to resort to the collection of the principal and interest thereof upon the property of the county, and by the other valid taxes, but whenever the aggregate poll tax in any county exceeds $2 the mandate to the sheriff should cease, and even within the $2 the poll tax can be applied only to the purposes of education and the poor, hence striking it out cannot affect the bondholder.

If there is any authority to be found in the Constitution for the courts to supervise and hold invalid an act of the Legislature in any case, this is clearly such instance. The equation between the tax on property and on the poll necessarily ceases, as is held in the cases above cited, when the poll tax reaches the constitutional limitation of $2, nor can it be levied for any other purpose than education and the support of the poor.

The Constitution at Halifax, in 1776, made no reference to the poll tax, and it has always been unknown in England except in the one instance where its imposition centuries ago caused the insurrection known as the "Watt Tyler Rebellion," in consequence of which it was promptly repealed and has never since been reenacted, though in that country, far more than in this, government has been by the classes and not by the people. At divers times up to 1698, in England, there was a so-called poll tax but graded according to amount of property of each taxpayer.

In the Revised Statutes of North Carolina in 1835 there was a poll tax of 20 cents which was levied also upon the slaves. In the Revised Code of 1854 the poll tax was 40 cents, and it was levied chiefly because slaves were not taxed according to value as property, and otherwise would escape taxation. There was no tax on personal property in this State till about 1850.

When the Constitution of 1868 was adopted a poll tax was authorized but it was strictly limited to $2, with the further pledge that it should be used solely for the purposes of education and the support of the poor. The equation between property and polls is only required when providing for the ordinary expenses of the State and county government, and therefore in many statutes, such as this, the levy of the poll tax has been omitted, even when the total would not exceed the $2. *Board of Education v. Comrs.*, 137 N. C., 310; *Jones v. Comrs.*, 107 N. C., 248.

Out of the forty-eight States less than half levy any poll tax at all, and in them it is mostly restricted to 50 cents or $1, and is applied to

education and the support of the poor. Hollander on Taxation. If the poll tax in this case of $1.50 is levied it will be largely collected out of men who have no wheels to pass over the roads, nor any real estate to be increased in value by their construction. If the poll tax should be omitted from the tax list this will conform the statute to the Constitution and will in no wise impair the validity or the value of the bonds to be issued under this act, for there is ample property in the prosperous and progressive county of Person out of which to pay the principal and interest on these bonds.

That the poll tax should be retained at all, and unrepealed here, when it has disappeared almost everywhere else, is an anomaly. But that it should be still levied (in violation of the pledge in the Constitution) in excess of $2, or applied to other purposes than education and support of the poor, especially since the unanimous ruling of the Court in the cases above cited and the assurance therein given that "this question cannot again arise," is proof how little weight and thought is given to the laborer and the men of small means in legislation.

It is true that the poll tax is levied on poor and rich alike. And that is the very objection to it, for the amount, which is of no consideration to the well-to-do, is oppressive to those poorer who must often take from the living of themselves and their families to pay the $7 or $8 which has often been exacted. There was no thought of these men and no one to speak for them when this poll tax provision was put into this statute.

It is no defense that formerly our roads were worked by conscription of labor, a system handed down from ruder times in England, the same system which under the name of "Corvées" aided most materially to bring about the Great Revolution in France. This has been abolished here not only because unjust, but because, with a deep sense of the injustice of it in those thus conscripted, the system proved to be inefficient. Our Constitution not only restricts the tax on the mere privilege of living to $2, and as some justification of such taxation requires the application of that solely to "education and the poor," but in the same spirit Article V, section 5, authorized the General Assembly to exempt from taxation "wearing apparel, household and kitchen furniture, the tools of farmers and mechanics, and other personal property to a value not exceeding $300." Those to whom this exemption would be an act of justice have never yet had sufficient influence to procure its enactment (till the act of 1919, to take effect in 1920, fifty-two years after the adoption of the constitutional authority), while the vast exemptions to corporations were kept in full force until invalidated as to railroads by the decision in *R. R. v. Alsbrook,* 110 N. C., 137. In *Jackson v.*

Commission, 130 N. C., 425, the railroads, however, were more successful in their contention.

WALKER, J., concurring: My views concerning the limitation and equation of taxation under Article V, section 1 of the Constitution, and the relation of sections 1 and 6 of the same article, were fully stated in *Moose v. Comrs.,* 172 N. C., 419, at p. 451, and *Collie v. Comrs.,* 145 N. C., 183, and need not be restated here. I have not changed my opinion in that respect, but the Court decided that under section 6, with the special approval of the General Assembly, a county might levy a tax for a special purpose without regard to the limitation as fixed by section 1 of Article V; and while I entertain now the same views as those set forth in *Moose v. Comrs., supra,* I defer to that decision, as it would be futile at this time not to do so, a majority of the Court, as now constituted, still adhering to the decision in *Moose v. Comrs., supra,* and for the reasons stated in the opinion of the Court as delivered by *Justice Allen* in that case. Therefore I concur in the result in this case. Except as heretofore stated, I concur fully in the opinion of the Court, and also in the reasoning upon the other questions involved. It may be that the question, as to the limit of taxation and the maximum of poll tax that can be levied, is not clearly and distinctly raised in this record, but I have referred to the *Moose* and *Collie* cases merely to exclude any inference that I had surrendered my views upon that question.

EMMA T. POWERS v. CITY OF WILMINGTON ET ALS.

(Filed 29 April, 1919.)

1. Appeal and Error—Verdict Set Aside—Matters of Law—Findings of Error—New Trial—Discretion.

Where the trial judge sets aside a verdict of the jury for errors committed in appellant's favor on the trial and not as a matter within his discretion, which course is not approved (*Shives v. Cotton Mills,* 151 N. C., 294), he should state separately at the time of the trial or in the case on appeal the several rulings he thinks erroneous which induced his action.

2. Same—Presumptions—Assignments of Error—Objections and Exceptions—Record.

On appeal from an order of the trial judge setting aside a verdict of the jury for errors he thinks he has committed on the trial, wherein he has not severally stated them, his action will not be reversed unless the appellant shows error, the presumption being in favor of the correctness of the rulings in the lower court; and the exceptions should be made to

properly appear of record, not only of the appellant but of the appellee, and the former should assign as error the refusal of his motion for judgment upon the verdict and the order setting the verdict aside, on the grounds that there had been no erroneous ruling against the appellee upon the trial.

APPEAL by plaintiff from *Stacy, J.*, at the December Term, 1918, of NEW HANOVER.

This is an action against the city of Wilmington and W. H. McEachern and A. G. Warren to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendants.

The plaintiff was injured on 9 September, 1916, by slipping and falling on the sidewalk on Front Street in Wilmington.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant city of Wilmington as alleged in the complaint? "Yes."

2. Was the plaintiff injured by the negligence of the defendant A. G. Warren, as alleged in the complaint? "No."

3. Was the plaintiff injured by the negligence of the defendant W. H. McEachern, as alleged in the complaint? "No."

4. Did the plaintiff by her own negligence contribute to her injury, as alleged? "No."

5. What damages, if any, is plaintiff entitled to recover? "$3,800."

6. Was the negligence of the defendant W. H. McEachern, if negligent at all, primary and of such a nature as to entitle the city of Wilmington to indemnity and judgment over against the said W. H. McEachern, as alleged? "No."

The plaintiff moved for judgment upon the verdict against the city of Wilmington which was refused, and the plaintiff excepted.

His Honor then set aside the verdict and ordered a new trial as to the city of Wilmington and the defendant A. G. Warren, "not as a matter of discretion but for errors committed in the trial of the cause," and the plaintiff excepted and appealed.

J. Felton Head and John D. Bellamy & Son, attorneys for plaintiff.
Carr, Poisson & Dickson, attorneys for defendant McEachern.
Robert Ruark attorney for defendant city of Wilmington.

ALLEN, J. The record is in a very unsatisfactory condition, and it illustrates the wisdom of the note of disapproval in *Shives v. Cotton Mills*, 151 N. C., 294, of the practice of setting aside a verdict for error in law and not in the exercise of a discretion.

In such cases the party in whose favor the verdict is returned is the appellant, and as he is interested in showing that no error was com-

mitted on the trial in order that he may be entitled to judgment on the verdict, the difficulty of securing a correct statement of case on appeal is greatly increased.

The right of appeal has been recognized in many decisions but the condition must be imposed of requiring the judge to state separately at the time of the trial or in the case on appeal the several rulings he thinks erroneous which induced his action.

In this case the verdict was in favor of the plaintiff, but the judge refused the motion for judgment upon the verdict and set it aside "for errors committed in the trial of the cause," and the plaintiff appealed.

The judge was within his rights to deny the motion for judgment if he had committed error, and the appeal therefore presents the question whether there was error up to the rendition of the verdict, and as the action of the judge was because he thought he had erred against the defendant, the city of Wilmington, the plaintiff must show there was no error against this defendant. "Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption is against him." *In re Smith's Will,* 163 N. C., 466.

The appellant must also assign the error complained of or it will not be considered. *Carter v. Reaves,* 167 N. C., 132.

The plaintiff has served a case on appeal in which the exceptions of the city of Wilmington were omitted and her own incorporated, and when the judge allowed "many," not all, of the exceptions of the defendant, she assigns this as error, contending "that as the defendants were not appealing they were not entitled to have a record of their objections and exceptions, noted upon the trial, incorporated in the statement of case on appeal."

The appellant then files ten assignments of error, all of them being directed to rulings against the *plaintiff,* and not one to an exception taken by the defendant.

This is a misconception of the status of the appeal and of the parties.

The verdict was in favor of the *plaintiff.* The judge set it aside because he had erred against the *defendant,* in the course of the trial, before the verdict. The plaintiff appealed, contending that there was no error against the defendant, and that therefore the order setting aside the verdict was erroneous, and to sustain his exception to the refusal to grant his motion for judgment and to the order setting aside the verdict, she must show there was no error against the defendant, and this cannot be done unless the exceptions of the defendant appear in the record.

Again, the plaintiff's brief is devoted to a discussion of the sufficiency of the evidence to support the verdict for the plaintiff and to the exceptions taken by the *plaintiff* on the trial, and has no reference

to an exception of the defendant, and we might sustain every contention made in the brief of the appellant and still we would be compelled to affirm the judgment or order of the Superior Court because the brief does not attempt to show that no error was committed against the defendant, which is the question involved in the appeal.

In this condition of the record and the brief, and as all of the exceptions taken by the defendant are not in the record, we cannot say his Honor erred in setting aside the verdict for errors committed in the trial, and his order thereon must be affirmed.

When appeals of this character are being prepared the appellant should make his statement of case on appeal, incorporating the exceptions of the opposing party, and should assign as error the refusal of his motion for judgment and the order setting aside the verdict, for that there was no error in the rulings against said party on the trial, which rulings are as follows, and then copy them.

Affirmed.

MARKHAM-STEPHENS COMPANY v. E. L. RICHMOND COMPANY AND THE FIRST NATIONAL BANK OF DURHAM.

(Filed 29 April, 1919.)

1. **Banks and Banking—National Banks—Garnishment.**

   A garnishment of funds by a creditor of one having funds in a national bank will lie, and is not objectionable on the ground that the bank is a national bank.

2. **Banks and Banking—Bills and Notes—Purchaser for Value—Collection—Evidence—Instructions—Appeal and Error.**

   Where a bank interpleads, claiming to be the purchaser of a draft for value from the drawer, and entitled to the money paid thereon in the hands of the collector bank, and there is no evidence that the interpleader had ever had any other transaction with the drawer, and the only evidence is that the interpleader was a purchaser for full value, etc., an instruction is reversible error that the interpleader would only be a collection agent if it received the draft, expressly or impliedly from its course of dealings, with the right to charge it back to the drawer should it not be paid, and refuse to instruct that they should answer the issue for the interpleader if they believed the evidence in the case.

APPEAL by intervenor, Pontiac Savings Bank, from *Devin, J.*, at September Term, 1918, of DURHAM.

This action was begun before a justice of the peace against E. L. Richmond Company to recover $170 for breach of contract in the sale of a carload of hay. J. H. Berry, a broker of Durham, sold to the plaintiff a carload of hay that came from E. L. Richmond Company

which proved to be damaged. Later J. H. Berry sold to the plaintiff another car of hay from E. L. Richmond Company. The bill of lading for the hay attached to the draft was in the following language:

$173.47 No. 1341

THE E. L. RICHMOND COMPANY
Wholesale Hay and Potatoes
DETROIT, MICHIGAN, March 7, 1917.

On arrival of N. Y. C. or St. L. car No. 10430, pay to the order of the Pontiac Savings Bank one hundred seventy-three dollars forty-seven cents, value received, and charge the same to account of

THE E. L. RICHMOND COMPANY,
Per A. B. Richmond, Jr.

To J. H. Berry, Durham, North Carolina.

Draft through the First National Bank.

On the back of said draft was the following endorsement:

Pay to the order of any bank, banker or trust company, all prior endorsements guaranteed. Pontiac Savings Bank, Pontiac, Mich. C. T. Merz, Cashier.

This draft, with bill of lading attached, was forwarded by the Pontiac Savings Bank to the First National Bank of Durham. The plaintiff paid the draft to the latter bank and thereafter garnisheed the proceeds of the draft in the hands of the First National Bank of Durham. The Pontiac Savings Bank interpleaded, claiming the ownership of the funds in controversy. The First National Bank of Durham moved to dismiss because attachment would not lie against a national bank and because there was no defect in the car of hay covered by this draft and bill of lading, and there was no allegation or proof of fraud.

The jury found the issue, "Is the interpleader, the Pontiac Savings Bank, the owner of the draft described in the complaint and entitled to the proceeds thereof?" in the negative. Judgment in favor of plaintiff against the First National Bank, garnishee, for $170 and costs. Appeal by the interpleader.

Fuller, Reade & Fuller for plaintiff.
Bryant and Brogden for defendants.

CLARK, C. J. The motion to dismiss was properly denied. There was no attachment issued against the national bank but merely garnishment of the proceeds of draft in its hands.

The draft in question was received by the Pontiac Savings Bank of Pontiac, Michigan, on 8 March, 1917, and was sent by it direct to the First National Bank of Durham for payment. Elmer L. Richmond,

a member of the partnership known as the E. L. Richmond Company, testified that this draft was sold to the Pontiac Savings Bank, who paid the face value of the same; that the bill of lading was attached to the draft; that there was no agreement that the Pontiac Savings Bank would protect the draft if it was dishonored and that the E. L. Richmond Company had not had this draft since said bank paid for it. The vice-president of the Pontiac Savings Bank, the receiving teller, and the cashier all testified that the draft and bill of lading was purchased by the Pontiac Savings Bank on 8 March, 1917, and that on that date said bank paid the E. L. Richmond Company the sum of $173.47, the face of the draft.

There was no evidence to the contrary. There was no evidence tending to show that the E. L. Richmond Company had ever sold any other draft to the Pontiac Savings Bank, nor that J. H. Berry, the drawee, or the plaintiff had ever had any dealings with the Pontiac Savings Bank. Nor was there any evidence that there was any course of dealings between the parties to this controversy and the intervenor, the Pontiac Savings Bank, nor was there any evidence of a custom of the Pontiac Savings Bank or any dealings whatever between it and the E. L. Richmond Company.

The plaintiff contended that the action was not a *bona fide* sale to the interpleader. The Pontiac Savings Bank, on the other hand, contends that it took the draft in the course of business, and actually paid E. L. Richmond Company the face value of the draft, to wit, $173.47.

The court told the jury in substance that if the interpleader took the draft in question with the right, either by express agreement or by implication from the course of dealing, to charge it back if not paid, that the interpleader bank would not be purchaser of the draft but a collecting agent. This charge was substantially the same as in *Worth v. Feed Co.*, 172 N. C., 335.

The interpleader contends that this charge was erroneous because there was no evidence that there had been any dealings prior to this transaction between E. L. Richmond Company and the Pontiac Savings Bank, and asked the court to instruct the jury, "If you believe the evidence in this case you will answer the issue 'Yes.'"

This contention of the interpleader was correct, and the court should have given the prayer as asked.

Error.

L. W. ODOM v. EDWIN MORGAN, EXECUTOR AND TRUSTEE UNDER THE WILL OF MARGARET L. MORGAN.

(Filed 29 April, 1919.)

1. Trusts and Trustees—Title—Merger.

Where the beneficiary of a trust estate in lands is also designated by the donor as the trustee for his own benefit, especially where there is no pecuniary interest of the beneficiary to be protected and no estate on contingency to be preserved, the equitable interest merges into the legal title and the title becomes a fee simple absolute one.

2. Same—Repugnancy—Restraint on Alienation.

While the doctrine of merger will ordinarily be prevented or not as the intent of the donor may appear from the expressions he has used in a written instrument under which the question has arisen, this will not apply where the donor has conveyed the legal title of lands to the donee to be held in trust for his own benefit, that is, the legal and equitable title to one and the same person, and his intent that there should be no merger may only be gathered from and is solely dependent on a further provision in the instrument that the title should be held for a term of years upon a condition repugnant to the legal title conveyed, and which is an unenforceable restraint upon the alienation of the lands.

3. Same—Power of Appointment.

A devise of the bulk of the testator's property, including the lands in controversy, to his wife in trust for ten years, also designating her the trustee, to be managed for her benefit as the testator would have done, and to become hers at the end of the time, conferring upon the wife the power to designate a successor in the trusteeship, by will, and she, before her death, accordingly designates her grandson to hold the lands in trust for himself and certain named relatives, to manage the property in their behalf as an "active trust," with full power to dispose of the same or any part thereof and hold the proceeds subject to the trust: *Held*, a conveyance made of the lands embraced in the trust by the wife's grandson, in conformity with her will, of the fee-simple title, is valid to pass the title conveyed by him.

CONTROVERSY without action heard on case agreed before *Shaw, J.*, at March Term, 1919, of SCOTLAND.

From the facts submitted it appears that Mark Morgan, owning a considerable estate, died in said county in January, 1916, leaving a last will and testament in which he devised and bequeathed the bulk of his property, including the lot in controversy, to his wife in trust for ten years under provisions hereinafter stated, and at the end of that time she was to own the estate in full. The will also conferred upon his wife the power, in her own last will and testament, to designate a successor in the trusteeship, etc.; that the wife, Margaret Morgan, died in September, 1916, leaving a last will and testament in which she devised all of her property coming to her under the will of her husband and otherwise, including said lot, to her grandson, Edwin M. Morgan, in trust

for himself and five other relations, to hold and manage the property in their behalf as an "active trust," and with full power to dispose of the same or any part thereof, the proceeds to be held in trust under the other provisions of her will; and said Edwin Morgan was also appointed and duly qualified as executor of the said will, etc. That in 1918 the said Edwin M. Morgan, as executor and trustee of his grandmother's will, bargained in writing the lot in question to plaintiff, Leggett Odom, for $4,500, and the latter having paid a part of the purchase money, declined to proceed further with the contract of purchase, on the alleged ground that the said trustee had, at present, no power under the wills in question to convey to plaintiff the title to said land, either of Mark Morgan or his wife, and the controversy is to determine the question whether said trustee and vendor is in a position to convey said titles and interests.

The court, being of opinion that the title offered is a good one, entered judgment that plaintiff comply with his contract and complete the purchase, and plaintiff excepted and appealed.

Cox & Dunn for plaintiff.
Walter Neal for defendant.

HOKE, J., after stating the case: In so far as the interest of Margaret L. Morgan is concerned, her last will and testament expressly confers upon the trustee the power to sell any and all of the property devised or bequeathed to him and convey the same in fee to the purchaser, and the question presented will depend on whether, under the will of Mark Morgan, her predecessor in ownership, there were such limitations imposed upon the property as to prevent the making of a good title until ten years after his death, which time has not yet expired. Recurring then to the provisions of the said will, after giving several legacies to be paid out of his insurance policies, in item 7, he expresses a desire that his estate should remain intact and in same condition as if he would manage it himself for a period of ten years after his death and with a view of making his purpose effective; in item 8 he wills the bulk of his property, real and personal, including the lot in controversy, to his wife, Margaret L. Morgan, in trust to control and manage the same, rent out the realty and collect the rents thereof, invest and collect the interest on the money, vote the mill stock, etc., or dispose of the same, appropriate the entire income to her support or so much of it as she considered necessary, and add the remainder to the body of his estate for a period of ten years. In another item he devises and bequeaths to his beloved wife all of his entire estate of every kind and description, real, personal and mixed, as the same may stand at the end

of the ten-year period; and in yet another he provides that his trustees are not to be held liable for any diminution in value of the property committed to their management. On these, the facts and portions of the will chiefly relevant, we concur in his Honor's view that the trustee under the will of Margaret L. Morgan is in a position to make a good title and the purchaser must comply with his contract. It is said to be the recognized position on this subject that one cannot be a trustee for his own benefit. The position is to a great extent dependent on the doctrine of merger which, as relevant to this controversy, is to the general effect that when a legal and equitable estate of the same class and quantity coincide in one and the same person, or when the former is the larger of the two, the latter is merged in the legal estate and becomes extinct. Tiedeman on Real Property, sec. 512. And while courts, in the exercise of general equitable principles, will "permit or prevent the application of the doctrine as the same may accord with the intent of the parties and the right and justice of the matter," we find no decision that interferes with the operation of the general principle where one is made sole trustee for his own benefit and is, at the same time, constituted the absolute owner of both the legal and equitable interests in the property, assuredly so when no pecuniary interest of the beneficiary is to be protected and no estate on contingency to be preserved. In *Butler v. Godey,* 12 N. C., 94, *Henderson, J.,* speaking for the Court, said: "To me it is incomprehensible how a person can take to the use of or in trust for himself, that he should be his own trustee, that he should have a right to call upon himself to perform the use and, if refused, enforce performance. So far from such an union being recognized in law, it is the well-established maxim that if the two interests become vested in the same person the use or trust immediately vanishes, it does not exist for a moment." The same position is affirmed in *Peacock v. Scott,* 101 N. C., 149, where *Smith, C. J.,* said: "Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect." *Wills v. Cooper,* 25 N. J. L., 137; *Swisher v. Swisher,* 157 Iowa, 55; *Greene v. Greene,* 125 N. Y., 506; *Clark v. Listers, etc.,* 82 Neb., 85; *Weeks v. Weeks,* 197 N. Y., 304; *Langley v. Conlan,* 212 Mass., 135; Perry on Trusts (6 Ed.), sec. 347; 39 Cyc., 248; 2 Pomeroy's Equity, sec. 788.

This doctrine of merger which we have been discussing in reference to legal and equitable interests has application also to particular and general estates in remainder and reversion, and considering the record in view of the authorities cited and the principles they illustrate, we are of opinion that Mrs. Morgan, under her husband's will, having been

given both the legal and equitable interests for ten years, and the remainder of the estate and all its accumulations after that time to be hers in fee simple, holds every interest in the property, actual or potential, and must be declared the absolute owner of the same. As said by counsel in his interesting argument before us, if she mismanaged the property, who is to call her to account or if she conveyed it, who is there to challenge her deed; and, in approval of the same general position, *Chief Justice Rugg,* delivering the opinion in *Langley v. Conlan supra,* said: "It is a general principle that where property is given for the benefit of certain persons in such a way that no one else can have a possible interest in it they are in effect absolute owners and should have the control and disposition. In such case equity will decree a dissolution of the trust, citing *Sears v. Choate,* 146 Mass., 395. It is also generally held that where the legal and equitable title to real estate both vest in the same person the equitable title will merge in the legal estate, and absolute ownership will ensue divested of the trust."

True, it has been held in many cases on the subject that in equity this doctrine of merger will be prevented or not according to the intent of the parties, but while the testator, Mark Morgan, has expressed his desire and purpose that his estate be kept together for ten years and managed as he would have done, having thereafter conferred the absolute ownership upon his wife, the intent in this instance must be evidence and controlled by the character of the title and interest he has given her, and considering the whole will and its correct interpretation, the only significance that could be given to this attempt to create a trust for ten years is to put a clog upon alienation for that period. This is all that is claimed for it by the appellant, and such a provision is avoided in this jurisdiction as repugnant to an estate of absolute ownership and the right of transferring the same as one of its inseparable incidents. The position as it prevails with us, the reasons upon which it rests, and many of the authorities showing its proper application have been stated and fully explained in the recent case of *Brooks et al. v. Griffin,* 177 N. C., 7, opinion by the Chief Justice, and further comment thereon is not required. Mrs. Morgan then, holding the full title under her husband's will and unfettered by any valid restriction, having, as stated, devised the property to her grandson, the defendant, in trust, with full power to sell and convey the same, the said trustee is in position to offer the title both of Mark Morgan and his wife, and his Honor has correctly ruled that the contract of purchase must be complied with.

There is no error and the judgment below is

Affirmed.

P. W. GARLAND, TRUSTEE v. LUTHER C. ARROWOOD.

(Filed 29 April, 1919.)

1. **Fraudulent Conveyances—Gifts—Debtor and Creditor—Statutes—Pleadings—Evidence—Trials.**

Upon the issue as to whether a bankrupt had, at the time of making a gift, retained property fully sufficient and available for the satisfaction of his then creditors (Revisal, sec. 962), allegations in his answer and his evidence, in attempting to show that he had done so, to the effect that "he owed little or nothing more than he had property to pay," is insufficient for the judge to reverse a negative finding of the jury and answer the issue in the affirmative, it being for the jury to thereon find as to the debtor's solvency or insolvency at the time of making the gift.

2. **Same—Intent.**

It is the determination by the jury of the fact of whether the donor had retained property amply sufficient to pay his creditors at the time of his making the gift, within the intent and meaning of the statute, Revisal, sec. 962, which determines the validity of the transaction, and the question of his intent to defraud has no significance.

3. **Same—Issues.**

As to whether the issue in this case, upon the question of the donor's having retained sufficient property to pay his debts at the time of the gift, was properly drawn in accordance with our statute, Revisal, sec. 962, *quere?* It is undisturbed upon the partial new trial awarded, leaving its proper form to the counsel and the court, under proper instructions. For the rights of existing and subsequent creditors, *Aman v. Walker*, 165 N. C., 224, cited and approved.

ACTION tried before *Harding, J.*, and a jury, at September Term, 1918, of GASTON.

The action was brought by plaintiff, as trustee in bankruptcy of Luther C. Arrowood, to subject certain land to the charge of money alleged to have been wrongfully invested by the bankrupt in building a barn and dwelling-house and in making other improvements thereon with the consent of the owner, William C. Arrowood, in fraud of the creditors of the bankrupt. The case was before this Court at Fall Term, 1916 (172 N. C., 591), upon the plea of the statute of limitations, and again at Fall Term, 1917, upon the competency of evidence, which was admitted by the court at the trial in April, 1917, to the effect that defendant, the donor of the money, had acquired lands of considerable value in 1917, eleven years after the transaction in 1906. This was admitted to show his solvency in the latter year. A new trial was awarded by this Court in each of the said appeals for error in the rulings of the lower court upon the questions above stated. The case was again tried at the last September Term of Gaston Superior Court, when the verdict was in favor of the plaintiff, as it had been in former trials.

With this brief preliminary statement and explanation of the facts, the full nature of the case will appear from the issues and verdict, which are as follows:

1. Did the defendant, Luther C. Arrowood, invest his individual funds in improvements on the lands of William Arrowood, known as the "Home Place," as alleged in the complaint? Answer: "Yes" (by consent).

2. Was the said Luther C. Arrowood insolvent at the time of making said improvements? Answer: "No."

3. What amount of such individual funds did he so invest? Answer: "Fourteen hundred dollars."

5. Was the defendant, Luther C. Arrowood, at the time of making said investments on the land of William Arrowood indebted to William Arrowood in an amount equal to the value of such investments? Answer: "No."

6. If such investment was made by the defendant, Luther C. Arrowood, out of his individual funds on said lands of William Arrowood, was it done with the intent to hinder, delay and defraud the existing creditors of the defendant? Answer: "No."

7. Are there any debts owing by the defendant which existed at the time said investments, if any, were made by him upon the lands of William Arrowood, now enforceable against him at the date of this trial? Answer: "Yes."

8. If the defendant made any improvements out of his individual funds on the lands of William Arrowood, did he do so with the intent to hinder, delay or defraud any of his creditors in the collection of debts contracted subsequent to the date of such investments? Answer: "No."

9. Did the defendant procure the said William Arrowood to change the devise of the home place to the defendant's wife for life? Answer: "No."

10. If so, was this done with the intent to hinder or delay the creditors of Luther C. Arrowood? Answer: "No."

11. Was the tract of land described in the deed from Chalmers Arrowood to Luther C. Arrowood introduced by the defendant as "Exhibit 7" the same tract of land devised to Chalmers Arrowood in the former will of William Arrowood? Answer: "Yes" (by consent).

12. Was this tract of land a part of the home place mentioned in the last will of William Arrowood and therein devised to Luther C. Arrowood subject to the life estate of his wife? Answer: "Yes" (by consent).

13. Was said tract of land so devised at the instance of and by the procurement of Luther C. Arrowood? Answer: "No."

14. Is the plaintiff's cause of action barred by the statute of limitation? Answer: "No."

15. Did L. C. Arrowood enter into possession of said Chalmers Arrowood tract under the devise of William Arrowood as alleged? Answer: "No."

16. At the time of the improvement and betterment of the land of William Arrowood by Luther C. Arrowood, was there a contract, agreement, and understanding subsisting between Luther C. Arrowood and William Arrowood by which the lands of William Arrowood, known as the "Home Place," were to be devised to Luther C. Arrowood in consideration of Luther C. Arrowood's improving the lands and giving to William Arrowood the use and benefit of such improvements and betterments during his life and otherwise supporting and maintaining said William Arrowood during his life? Answer: "No."

The court set aside the verdict as to the second issue and answered the issue "Yes," and the defendant excepted. Judgment was entered for the plaintiff upon the amended verdict, and defendant again excepted and appealed.

Mangum & Woltz, S. J. Durham and Tillett & Guthrie for plaintiff.
F. I. Osborne, Carpenter & Carpenter and A. C. Jones for defendant.

WALKER, J., after stating the case: The court erred, not in setting aside the verdict as to the second issue, but in answering the issue itself, and thereby reversing the jury's finding. The plaintiff contended that the second issue is immaterial, as the defendant in the sixth section of his answer admitted his insolvency at the time the improvements were made on his father's premises. Saying that "he owed little or nothing more than he has property to pay" was not definite enough for a judicial admission that he was insolvent. If he owed nothing more than he had property with which to satisfy all claims against him, he might well be solvent within the meaning of our statute as to fraudulent conveyances, which declares that no voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settlor, prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settlor. All things considered, the jury may have found, upon this statement in his answer, that the property retained by the defendant, Luther C. Arrowood, was "fully sufficient and available" to pay his then existing debts. We exclude from our consideration the other half of the statute (Revisal, sec. 962), concerning the effect of indebtedness, as evidence

of fraud, with respect to prior and subsequent creditors, as it appears to be immaterial for the purpose of deciding this appeal. It is apparent from a reading of section six (6) of the answer that the defendant was attempting, at least, to deny his insolvent condition, and to assert that he was only able to take care of his own indebtedness. Nor do we think that his testimony upon the same subject can be taken as an admission of his insolvency within the meaning and definition of that word by the statute. It is not a judicial admission, but merely evidence, which, coming from a party whose interest will be adversely affected by it, may more readily convince the jury that the fact to which he testified exists, but it is not decisive, as a judicial admission would be, within the principle that what is admitted need not be proved. *Tredwell v. Graham,* 88 N. C., 208. A calculation made from his own figures or estimate of what he was worth at the time the money was expended for making the improvements, however strong as proof, was not so conclusive as to withdraw the question from the jury. Taking all the testimony in the case together, including, of course, that of Luther C. Arrowood, which is now claimed to contain an admission of insolvency, we are of the opinion that it should have been submitted to the jury to find the fact of solvency or insolvency, and that the judge erred in deciding that question himself and answering the issue without the intervention of the jury.

The other issues involved substantially mere questions of fact, and there was evidence to support the verdict.

Some of the issues were answered by consent, and most, if not all, of the remaining ones were answered favorably to the appellant. The case, therefore, practically turned upon the answer to the second issue. The motion for a nonsuit was properly overruled. The same motion was before the Court in the former appeals, and was denied, as the Court granted a new trial in each of the two appeals, which could not have been done unless the nonsuit had been disallowed. This decision, too, was right, as there was evidence to sustain the cause of action.

The jury have found that there was no actual intent to defraud or, in other words, no *mala mens,* but if the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made. *Black v. Saunders,* 46 N. C., 67; *Aman v. Walker,* 165 N. C., 224; *Michael v. Moore,* 157 N. C., 462. The burden of at least going forward with proof of such retention of property is upon the defendant, where, as found in this case by the jury, there is a voluntary gift or settlement. *Brown v. Mitchell,* 102 N. C., 347, 369; *Tredwell v. Graham,* 88 N. C., 208; *Cook v. Guirkin,* 119 N. C., 13; *Aman v. Walker, supra.*

It may be that the second issue should be framed more in accordance with the language of the statute in regard to voluntary gifts (Revisal of 1905, sec. 962), but we leave this to counsel and the court, as in its present form the issue may answer all practical purposes with proper instructions from the judge.

We have considered, and decided so far, only those questions which are directly involved in this appeal, confining ourselves strictly to them. The rights of existing and subsequent creditors when there is a voluntary gift or settlement voidable under the statute, are fully discussed and set forth in *Aman v. Walker, supra,* and we content ourselves with merely referring to that case where the subject is so clearly and accurately treated.

Our conclusion is that there was error, and that there should be a new trial, which, though, must be restricted to the second issue only, and the other issues will stand as now answered. This opinion will be certified with instructions to proceed in accordance therewith.

New trial as to second issue.

R. A. RATCHFORD v. THE CITY OF GASTONIA ET AL.

(Filed 29 April, 1919.)

Health—Municipal Corporations—Cities and Towns—Ordinances—Surface Privies—Assessments—Liens.

An ordinance placing surface closets or privies within the corporate limits of the town under the supervision and inspection of the town authorities, and imposing a charge of thirty cents a month upon the owners of the property for cleaning and inspecting them, making it a lien upon the lands, enforceable in the same manner as State, county and municipal taxes, is valid and enforceable under ch. 36, subch. 7, sec. 4, Laws 1917, providing that "cities and towns shall have the power summarily to remove or abate, etc., everything in the city limits, or within a mile of said limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and if not paid shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes"; and also comes within the spirit of the preamble to our Constitution that one of its objects is "to promote the general welfare."

APPEAL by plaintiff from *Adams, J.,* at chambers in Gastonia, 2 March, 1919; from GASTON.

This was an application for an injunction against the sale of the lot under an ordinance of Gastonia which prescribed that every surface

closet or privy in the city should be cleaned and inspected under the supervision of the city, and a charge or assessment of thirty (30) cents per month was to be levied or imposed for such work, and was to be collected from the owner of the property, and with the additional provision that on failure to pay such assessment such charge shall be a lien upon the real estate upon which such closet is located. The city of Gastonia advertised a piece of real estate of the plaintiff upon which a closet was situated for dues on such closet and for other dues on closets owned by plaintiff. The restraining order was dissolved, and plaintiff appealed.

Mangum & Woltz for plaintiff.
P. W. Garland for defendants.

CLARK, C. J. Laws 1917, ch. 36, subch. 7, sec. 4 (a general statute in regard to "cities and towns"), provides as follows: "The governing body, or officer or officers who may be designated for this purpose by said governing body, shall have the power summarily to remove, abate, or remedy, or cause to be removed, abated, or remedied, everything in the city limits, or within a mile of said limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes."

The plaintiff, R. A. Ratchford, is the owner of eleven such houses which he rents, some to white and some to colored persons, none of whom own property themselves.

Prior to June, 1918, the contractor who had been doing scavenger work for the city of Gastonia had been required to collect pay for the same from the tenants or occupants of such houses, and under an ordinance of the city of Gastonia he was required to clean such surface closets, regardless of whether or not he collected his pay from such tenants; but he had so much difficulty in collecting from many of such tenants that he had reported to the board of aldermen that he could not afford to continue to do such work.

It appears from the affidavit of Dr. C. J. McCombs, the city physician, and it appears to be an established scientific fact, that any surface closet is a nuisance, and that all cases of typhoid fever are a result of having swallowed a germ from human excrement.

It also appears that from 15 July, 1918, until 1 January, 1919, there were forty-four cases of typhoid fever within the limits of the city of Gastonia; that the said board of aldermen, on account of the large number of surface closets within the city, have been confronted with a

serious proposition as to how to take care of the situation. There were so many cases of typhoid fever that it attracted the attention of the State Board of Health, and the Board of Aldermen of Gastonia were desirous to adopt the best and most sanitary regulations for the protection of the public.

On account of the fact that many tenants occupying rented houses are of unsatisfactory character, no small part of them being a floating population, such as the occupants of tenement houses at cotton mills who are continually moving about from one place to another, it was impracticable to obtain men to do this scavenger work who would agree to look alone to the occupants or tenants for their pay, and it appeared that the only system by which they could be obtained to do this work was for the city to become responsible therefor to the man doing the work and to collect for the same from the owners of such houses. In view of this situation the board adopted, in June, 1919, the following ordinance:

"*Cleaning Surface Closets.* Each and every surface closet or privy in the city of Gastonia used in connection with a dwelling shall be cleaned and inspected under the supervision of the city, and a charge or assessment of thirty cents per month is hereby levied and imposed for and on each and every said surface closet for such cleaning and inspection; said charge or assessment shall be paid by the owner of the land or property on which any surface closet shall be located, and shall be due, collectible and payable to the city of Gastonia, at the office of the tax collector, on the first day of each calendar month for and covering the period of the next preceding calendar month. The failure of any person or corporation so charged to pay said charge or assessment when the same shall be due and payable shall subject said person, firm, or corporation to the payment of an additional sum or penalty of 50 per cent of the amount of the charge or assessment due and unpaid; said charge or assessment shall be a lien upon the real estate upon which any surface closet shall be located, which lien shall attach to said real estate at and from the time of the cleaning and inspection of any such surface closet as provided for herein, and shall continue until such charges or assessments, with any penalty and costs which shall accrue thereon, shall be paid: said lien shall be enforceable in the same manner that is provided by the laws of the State for the enforcement of the lien of the State, county, and municipal taxes. This ordinance shall be in full force and effect from and after 1 July, 1918."

It seems that the only question of importance to be considered upon the record in this case is as to the validity of such ordinance.

We think this ordinance is a valid exercise of the power reposed in the town authorities for the protection of the health of the people of

the town, and that it is fully authorized by the powers expressly conferred by sec. 6, subsec. 7, ch. 36, Laws 1917, above recited.

All government is, or should be, established and maintained for the public welfare, whether such government be that of a town or city, county, State, or nation. It is for that purpose that governments are established, as is stated in the great Declaration of American Independence. The Constitution of the United States recites in its Preamble as one of the objects for the establishment of a Federal Union "to promote the general welfare." *"Salus populi suprema lex."* It is for this end that government of all kinds are established and maintained at great expense.

The necessity of sanitation is fully recognized and is becoming of more and more importance with the knowledge which we obtain of the causes of disease and death. It would be impossible to maintain that cleanliness, which is as necessary for the protection of health and life as courts and juries and the administration of justice are to protect life and property, unless this is done by public supervision. The narrowness, or selfishness, or ignorance of one man in not keeping his premises in a cleanly condition would nullify the action of all the other citizens, combined, for that purpose, by turning loose the flies and other insects which may carry the seeds of disease to other homes throughout the city. This general supervision cannot be maintained by collecting the charges for that service from the renter, who may be here today and elsewhere tomorrow. The party responsible is the owner of the premises. The land cannot move. The renter or temporary occupant can do so at will. Therefore the charge is a very proper and necessary one against the property itself, and is authorized by the statute in the same way that the establishment of adequate paving of the sidewalk and streets and of sewerage are thus established for the same reason that the failure of some citizens to pave the sidewalk or streets or to connect with the sewer would destroy to a great extent the benefit of these improvements in the entire town.

The town authorities not only have the power to impose such duty upon the land for the necessary protection of the health of the citizens but they would be derelict in their duty as such officials, and in proper cases liable to indictment for failure to protect the health of the public by such necessary regulation.

Doubtless the time is not far distant when by statute all manufacturing establishments or industries employing more than a certain number of people will be required to institute sewerage in their tenement houses, even when located outside town limits, in order to protect the health of the employees and of the neighborhood as well. In most towns of any size, surface closets are abolished, and sewerage is required.

In view of the advance of medical science and regard for that sanitation which must be universal in order to be at all effective, there must be an extension of the requirements which by experience have been demonstrated as necessary for the protection of the public health. Accordingly the General Assembly of 1919 enacted requirements as to sanitary closets even in the country.

The public health is a matter of importance to the entire neighborhood, and especially to all the inhabitants of a town or city, for the indifference or ignorance or neglect of one man will nullify the precautions taken by all others in that locality. Such ordinance as is here in question is a necessary protection, which will be extended in its scope with the increase of knowledge and can never be diminished. The requirement of sewerage will be better than such ordinance as this which is the minimum.

The enforcement of such regulations as this by an officer appointed by the city directly through its officers and employees is not only more economical but it is the only method of making it efficient. In 28 Cyc., 717, 718, authorities are cited upholding such ordinances. For an interesting discussion of the subject, see *Walker v. Jameson,* 49 Am. St., 222.

Even if there had not been precedents sustaining such authority, the act above cited of 1917 confers the power, and it may be that the authority would exist even without the statute as a necessary inference from the requirement and duty imposed on the town authorities to protect the public health. The only authority relied on to the contrary is *S. v. Hill,* 126 N. C., 1140. That case held that the ordinance could not take from the citizen the right to cleanse his own premises if they became filthy, by reason of the city not having required its scavenger to do the work oftener. This is in the direction of promoting better sanitation and not of forbidding the city to enforce it. The dissenting opinion in that case recognizes this by saying, "I agree with the majority that the best method is to have it (the scavenger work) done directly by the city through its officers and employees," and since then the act of 1917, above cited, fully confers the power and imposes the duty upon the towns and cities of the State. Strange, as it will now seem to us, the opinion states at at that date (1900) there was no public sewerage in Wilmington. Since then there has been great progress in sanitation and recognition of the fact that unless made universal by public supervision it will be defective and inefficient. Filth-producing conditions in the slums, or among the poor, will be carried by flies and other agencies, to all other parts of the town. Small-pox or typhoid among any part of the people of the town is a menace to all the inhabitants thereof.

Affirmed.

PLANTERS NATIONAL BANK OF VIRGINIA v. WYSONG & MILES COMPANY ET ALS.

(Filed 7 May, 1919.)

1. Usury—Banks and Banking—Deposits.

Where a bank has contracted with a borrower that in consideration of the loan the latter should keep a certain sum of the money deposited in the bank, beyond his control, and charges and receives in advance the full rate of interest on the entire amount, the transaction is an usurious one.

2. Usury.

The elements of usury are defined to be a loan or forbearance of money, either express or implied, upon an understanding that the principal shall or may be returned, and a greater profit than is authorized by law shall be paid, where the transaction is entered into with the intent to violate the law, which intent may be implied if all the other elements of usury are expressed upon the face of the instrument or established by sufficient evidence.

3. Usury—Pleadings—Counterclaim—Banks and Banking—National Law—Interpretation—Courts—Federal Courts.

While the State court has concurrent jurisdiction with the Federal court in an action brought upon a note by a national bank, and also of the question of usury involved in the transaction, if any, the pleading and procedure required expressly by the Federal statute, as interpreted by the decisions of the Supreme Court of the United States, to recover the penalty must be followed, and the interpretation of the statute by that Court will prevail over a contrary one by the State court, and over a State statute relating to the subject; and, therefore, where usurious interest has been actually received by a national bank for a loan, it is required that the maker of the note bring an independent action to recover double the amount of the interest paid and received, which is allowed by the statute as a penalty, and the penalty may not be set up as a counterclaim in the action brought by the national bank in the State court to recover on the note.

4. Pleadings—Statutes—Federal Statutes—Interpretation—Courts—Federal Courts.

The local or State law as to pleadings and procedure ordinarily permitted and allowed by the Federal courts to control in actions in the State courts involving Federal questions, cannot be extended so as to include instances wherein a particular method is specially prescribed by the Federal law, as interpreted by the United States Supreme Court, although this interpretation may be at variance with the decisions of the State courts upon the same statute or a similar enactment by the Legislature of the State.

ACTION tried before *Lane, J.*, at February Term, 1919, of GUILFORD.

The action was brought by the plaintiff, a national bank, to recover of the defendants the amount of three promissory notes aggregating ten thousand three hundred and forty-nine and fifty-four hundredths dol-

lars ($10,349.54), one dated 10 September, 1917, for four thousand three hundred and forty-nine and fifty-four hundredths dollars ($4,349.54), and due on 15 January, 1918; another dated 24 September, 1917, for one thousand dollars ($1,000), due 15 January, 1918; and a third, 8 October, 1917, for five thousand dollars ($5,000), due on 15 January, 1918. These several notes were payable at the office of the plaintiff in the city of Richmond, State of Virginia. Plaintiff sues for the recovery of the face value thereof with interest from maturity, to wit, 15 January, 1918, at the rate of 6 per cent per annum.

The material part of the pleadings is as follows:

The plaintiff, Planters National Bank, complaining of and concerning defendants, says:

1. That it was, on the dates hereinafter mentioned, and ever since has been, and still is, a corporation, created, organized and existing under and by virtue of the laws of the United States prescribed for the organization of national banks, and as such is engaged in banking, with its principal office and place of business in the city of Richmond, State of Virginia.

2. That the defendants are all residents of the county of Guilford, North Carolina.

3. That the defendant, Wysong & Miles Co., was, at the dates hereinafter mentioned, and ever since has been, and still is, a corporation, with its home office and place of business in the county and State first above named.

4. That on 10 September, 1917, the defendant, Wysong & Miles Co., for value received, executed and delivered unto this plaintiff, Planters National Bank, its writing obligatory, or note, whereby it promised to pay, on 15 January, 1918, to this plaintiff, Planters National Bank, or order, without offset, four thousand three hundred forty-nine and fifty-four hundredths dollars ($4,349.54), negotiable and payable at Planters National Bank, Richmond, Va.

5. That on 24 September, 1917, the defendant, Wysong & Miles Co., for value received, executed and delivered unto this plaintiff, Planters National Bank, its writing obligatory, or note, whereby it promised to pay, on 15 January, 1918, to this plaintiff, Planters National Bank, or order, without offset, one thousand dollars ($1,000), negotiable and payable at Planters National Bank, Richmond, Va.

6. That on 8 October, 1917, the defendant Wysong & Miles Co., for value received, executed and delivered unto this plaintiff, Planters National Bank, its writing obligatory or note whereby it promised to pay, on 15 January, 1918, to this plaintiff, Planters National Bank, or order, without offset five thousand dollars ($5,000) negotiable and payable at Planters National Bank, Richmond, Va.

7. O. C. Wysong and the defendants J. A. Kleemier and J. R. Brown all endorsed said writings obligatory, or notes, by writing their several and respective names on the back of the three several notes or writings obligatory before the same were negotiated or delivered to this plaintiff.

8. On each of said notes, or writings obligatory, and just above and over the signatures of the said Wysong, Kleemier, and Brown, the following entry is made: "The undersigned hereby waive demand, protest, notice of dishonor, and the benefit of the homestead exemption as to this debt." Said entry just quoted on each of said notes was on there before and at the time the said Wysong, Kleemier, and Brown endorsed said several notes, and was and still is a part of each of said notes or obligations.

9. O. C. Wysong died during the year 1918, while a resident of the county and State first above mentioned, leaving a last will and testament wherein he named the defendant, Fannie I. Wysong, as executrix thereof, and the said will and testament has been duly probated and recorded in the office of the clerk of the Superior Court for the State and county first above named, and said Fannie I. Wysong has been duly qualified as such executrix, and is now acting as such.

10. The maker of, and the endorsers upon, the three several notes or writings obligatory hereinbefore referred to, and all of them, failed to pay the said three sums and every part thereof, at maturity or at any other time, so that the said three sums hereinbefore mentioned, which total ten thousand three hundred forty-nine and fifty-four hundredths dollars ($10,349.54), are due and owing by these several defendants to this plaintiff, with interest on the full amount of the same, which total, as above stated, ten thousand three hundred forty-nine and fifty-four hundredths dollars ($10,349.54), with interest thereon from 15 January, 1918, till paid.

Then follows the prayer for judgment.

The defendants answered and counterclaimed, as follows:

1. The first paragraph of the complaint is admitted.

2. The second paragraph of the complaint is admitted.

3. The third paragraph of the complaint is admitted.

4. The allegations contained in the fourth paragraph of the complaint are admitted to be true, but the defendants allege that the note mentioned in said paragraph is one of a series of notes given by the defendant, the Wysong & Miles Co., to the plaintiff, as hereinafter set out in the second defense and counterclaim in this answer, and that the said note is usurious, and has been paid as alleged in said counterclaim.

5. The allegations contained in the fifth paragraph of the complaint are admitted to be true, but the defendants allege that the note mentioned in said paragraph is one of a series of notes given by the defend-

ant, the Wysong & Miles Co., to the plaintiff, as hereinafter set out in the second defense and counterclaim in this answer, and that the said note is usurious and has been paid as alleged in said counterclaim.

6. The allegations contained in the sixth paragraph of the complaint are admitted to be true, but the defendants allege that the note mentioned in said paragraph is one of a series of notes given by the defendant, the Wysong & Miles Co., to the plaintiff, as hereinafter set out in the second defense and counterclaim in this answer, and that the said note is usurious and has been paid as set out in said counterclaim.

7. The seventh paragraph of the complaint is admitted.

8. The eighth paragraph of the complaint is admitted.

9. The ninth paragraph of the complaint is admitted.

10. The allegations contained in the tenth paragraph of the complaint are not true.

Further answering, and for a second defense and counterclaim, the defendants allege:

That on or about 12 June, 1908, the defendant, the Wysong & Miles Co., commenced to borrow money from the plaintiff, and thereafter the said defendant, from time to time, and during a period of time extending from said 12 June, 1908, to 8 October, 1917, borrowed various sums of money from the plaintiff, and renewed the loans from time to time and about every three or four months during said period, by executing notes in renewal of former notes.

That the plaintiff, in each and every case, and out of each and every loan of money to the defendant, simply gave the latter a credit at the plaintiff's bank for the amount borrowed at any particular time, and permitted the defendant to check against such account to the extent of 80 per cent of the amount borrowed, and for which said defendant had executed its note to the plaintiff, and the plaintiff retained out of each loan to the defendant 20 per cent of the amount for which the defendant had given its note to the plaintiff; that in addition to retaining the 20 per cent on each loan, as aforesaid, the plaintiff reserved, charged and collected out of each and every loan made by the plaintiff to the defendant, in advance, the interest on the full amount of loan at the rate of 6 per cent per annum.

That each and every of said loans, and each and every of said notes in renewal, including the three notes sued on in this case and set out in the complaint, formed a part of a series of loans and notes given by the defendant to the plaintiff for such loans from time to time during the period of time from 12 June, 1908, to 8 October, 1917, and constituted one continuous transaction.

That the said defendant, the Wysong & Miles Co., on 12 June, 1908, borrowed from the plaintiff the sum of $5,000, at 6 per cent interest,

due three months from that date, but the plaintiff let the defendant have on said loan and on the note given for said loan only $4,000, and collected from the said defendant the interest on said sum of $5,000 at the rate of 6 per cent per annum.

That on 7 October, 1908, the defendant borrowed from the plaintiff the sum of $5,000 at 6 per cent, due in ninety days, and gave its note to the plaintiff for the sum of $5,000, but that plaintiff let the said defendant have on said note only the sum of $4,000, and charged and collected from the defendant the interest on the sum of $5,000 at 6 per cent.

That on 14 January, 1909, the defendant borrowed from the plaintiff the sum of $5,000, at 6 per cent, due in ninety days, and gave the plaintiff a note of the defendant for $5,000, but the plaintiff let the defendant have on said note only the sum of $4,000, and collected from the defendant the interest on $5,000 at 6 per cent.

That the said defendant, at various times and every few months during said period of time from 12 June, 1908, to 8 October, 1917, borrowed other large sums of money from the plaintiff, and gave the notes of the defendant for said sums of money as borrowed, but the plaintiff in each and every instance let the defendant have only 80 per cent of the amount agreed to be loaned and for which the defendant gave its note, the plaintiff reserving 20 per cent of each loan, and also charging interest at 6 per cent on the entire sum for which a note was given by said defendant.

That the defendants are unable to give in detail a list or statement of all of said notes and renewals, but the defendant, the Wysong & Miles Co., paid the plaintiff as interest on said notes the sum of seven thousand one hundred and sixty-one dollars and thirty-seven cents ($7,161.37).

That the defendant gave to the plaintiff a large number of notes in renewal of former notes, and the notes sued on in this case are renewal notes.

That the sum of $7,161.37 paid by this defendant to the plaintiff is usurious and unlawful interest, knowingly charged and collected by the plaintiff from the said defendant.

Wherefore, the defendants demand judgment:

1. That the defendants recover of the plaintiff on the counterclaim set up in the answer twice the amount of interest paid to the plaintiff, to wit, the sum of $14,322.74, and also the amount of interest actually paid, to wit, the sum of $7,161.37.

For costs, and for such other and further relief as the defendant may be entitled to receive.

The plaintiff replied, denying all usury, and also denying circum-

stantially the existence of any transaction from which usury could be inferred. It further alleged that the contracts were made in Virginia, and were not usurious, and that the action was not commenced in time for the recovery of any penalty for the alleged usury.

The following verdict was returned by the jury:

1. Was there an agreement between the plaintiff and the defendant by which the defendant was to keep on deposit with the plaintiff 20 per cent of the loans made by the plaintiff to the defendant? Answer: "Yes."

2. What amount of interest has the defendant paid to the plaintiff on the loans mentioned in the pleadings? Answer: "$3,846.71."

3. Is the defendant's alleged cause of action barred by the statute of limitations? Answer: "No."

4. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: "$10,449.54, with interest on said sum from 15 January, 1918, at 6 per cent."

5. Is the plaintiff indebted to the defendant on its counterclaim as alleged in the pleadings, and if so, in what amount? Answer: "$7,693.42."

Judgment was rendered upon the verdict, in favor of plaintiff, for the difference between the two amounts, that is, $10,449.54 and interest and $7,693.42, to wit, $3,445.77, and costs. Plaintiff appealed because there could be no recovery for usury, and defendant appealed because the court denied a recovery for usury on any of the serial notes except those in suit, the exception being as follows: "The court erred in excluding evidence to the effect that the defendant had paid the plaintiff as interest or discount on all the loans made by the plaintiff to it, the sum of $7,161.37, and in confining the defendant to evidence as to the amount of interest or discount paid by the defendant to the plaintiff on the three notes sued on in this case."

King & Kimball for plaintiff.
Jerome & Scales for defendants.

WALKER, J., after stating the case: There are three principal questions raised in this case: (1) Was there usury? (2) If so, can it be recovered by way of counterclaim? (3) Is the action barred by the statute?

1. If a bank loans two thousand dollars at 6 per cent interest, with the understanding and agreement that it shall retain five hundred dollars of the amount as a deposit of the borrower in the bank, which shall not be subject to his check or his withdrawal of it, but remain on general deposit under control of the bank, it is evident that the bank is

charging and receiving 7½ per cent interest or 1½ per cent in excess of the legal rate of interest. The transaction has not even the merit of being an ingenious device to hide or conceal the usury, for it is perfectly apparent that the legal effect is, as the borrower is paying 6 per cent on two thousand dollars, when he is to receive only fifteen hundred dollars. The usury is plain and palpable and there can be no doubt of the intent, on the part of the bank, to violate the law against the payment of excessive interest or usury. There are, generally speaking, four elements of usury: (1) A loan or forbearance of money, either express or implied; (2) upon an understanding that the principal shall be or may be returned; (3) and that for such loan or forbearance a greater profit than is authorized by law shall be paid or agreed to be paid; (4) entered into with an intention to violate the law. The fourth element may be implied if all the others are expressed upon the face of the contract, the other three must be established by a sufficiency of evidence. The transaction in question clearly embraces all of these elements. The usury is indisputable. 29 Am. and Eng. Enc. (.... Ed.), 509, states that, "In the case of loans or discounts by a bank at the highest legal rate of interest, a provision that the proceeds of the loan or discount or any part thereof shall be kept as a deposit in the bank during the period or a portion of the period of the loan renders the transaction usurious, for the reason that the borrower thus pays interest on money which he does not receive or have the use of." It was held in *Gilder v. Hearne,* 14 S. W., 1031, that where the statute provides that all contracts which, either directly or indirectly, stipulate for a higher rate of interest than 12 per centum per annum shall be void and of no effect for the whole rate of interest, a note for thirteen hundred and eighty dollars, bearing interest at 12 per centum, for which only twelve hundred dollars is received by the maker, is usurious. Judge Denio, in *East River Bank v. Hoyt,* 32 N. Y., 119, 126, said that "the character of the transaction, and particularly the material feature, that $500 of the money borrowed and for which interest was paid was to be retained by the lender until the expiration of the credit, is conceded by all the evidence. It was illegal to stipulate for such an advantage. In that, the case shows a contract for usury, with scarcely an attempt at disguise." And *Judge Potter,* who spoke for the Court in that case, said: "Assuming these facts to be true, it presents a case of bold, unmitigated violation of the statute in its letter and spirit. If the statute prohibiting usury can be evaded by such a subterfuge as has been offered in this case, it has become a dead letter, and had better be repealed at once. By such a contrivance an individual or a bank, in the loan of one-half their capital, may draw interest upon the whole. The device in this case lacks even the merit of ordinary skill in its consummation; it is

an act of cupidity and extortion, that is not provided with even the decencies of a cloak to cover its nudity. If the Court could have anything to do with the policy of the usury laws the review of this case would present a fitting occasion to raise a warning voice against their repeal, but the policy of these laws is with the Legislature and not with the courts. The defense of usury, like every other legal defense authorized by statute, is entitled to the same respect as other defenses in the courts, and when proved, it is the duty of the court to regard them the same as other cases. In the review of this case I have come to the conclusion that the testimony, independent of the testimony objected to, presents a clear case of judgment in favor of the defendant." *Chancellor Halstead* said of a transaction substantially similar to this one: "I think it is well calculated to show how very hard is the way of the transgressor; and to impress upon us the truth that if shallow devices are to be permitted to succeed in overcoming the defense of usury, great elasticity of conscience and great injury to the cause of morals will be the result." *Cummins v. Wire,* 6 N. J. Eq., 73, at p. 84. He added that the plaintiff with "studied sentences" could not disguise or conceal the usury, which was so glaring, and that his replication to the charge of demanding and receiving usury amounted "to nothing and a little less," and concludes that the case, then, as it stood when the bond and mortgage were executed, is clearly proved as set up in defense by the answer of Magie and Sanford. It was a loan of $1,900, and the taking, therefor, a bond and mortgage for $2,000, and interest thereon. This is clearly usurious.

Another case like the one at bar is *Butterworth v. Pecare,* where it was held that in an action by the receiver of a banking incorporation against the endorser of a note, an answer alleging that the bank of which plaintiff is receiver discounted the note on which he sues, upon a corrupt agreement against the form of the statute that the defendant should receive $300 (the amount of the note being $500 and it being payable three months from its date), and leave the remaining $200 in the bank until the note became due, then to be applied towards its payment, sufficiently states the defense of usury. Where it is proved that the bank discounted the note at the full legal rate for the time it had to run, and required the endorser to give them his check for $200, in pursuance of an agreement to that effect, on which it was discounted, and the next day charged this check against the credit given on the discount, a verdict finding usury should be sustained. Charging the check in account shows that the endorser was to have the use of only $300, less the discount on $500, and was to pay therefor interest on $500. Upon such facts it would be proper to instruct the jury to find for the defendants. 8 Bosworth (N. Y.), 671. And to the same effect

is *Barr v. Am., etc., Pisgah Church,* 10 Atl. Rep. (N. J. Ch.), 287. It was there held that where one, as agent of the mortgagee in the negotiation of a mortgage after the execution of the same, held it for three or four months, and delayed payment of the money due, and then, on the order of the mortgagors, advanced part of the money and collected interest on the full amount of the mortgage, and on foreclosure proceedings it appeared that the subsequent acts of the agent were in part, if not altogether, the acts of the mortgagee: *Held,* that the mortgage was subject to the penalty of the New Jersey statute respecting usury, which provides that the true sum loaned, without interests or costs, only can be collected. It has also been held that where a person lends a sum of money, the repayment of which, with interest at the rate of 6 per cent, is secured by a mortgage, and at the time of the loan and in consideration of it a portion of the money in excess of the legal rate of interest is returned to him by the borrower, the transaction is usurious. *Andrews v. Poe,* 30 Md., 486. See, also, *Vilas v. McBride,* 17 N. Y. Supp., 171.

This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguise, and decided according to its substance and its necessary tendency and effect, when the purpose and intent of the lender are unmistakable. And this is the correct rule. *Unifelder v. Carter's Admr.,* 64 Ala., 527. In *Clark v. City of Des Moines,* 19 Iowa, 199, it was held that warrants issued by a municipal corporation in payment of a judgment at the rate of one dollar in warrants for every seventy-five cents due on the judgment are tainted with usury. See, also, Webb on Usury, sec. 27 *et seq.* But we are of the opinion that the principle of *Ehringhaus v. Ford,* 25 N. C., 522 and 529, denounces this kind of transaction as usurious. It was there held that where a bank of this State agreed to lend to an individual notes of a Virginia bank, which were at a depreciation in the market, below both specie and the notes of the bank in this State, and the borrower was to give his note at ninety days, to be discounted by the bank, and to be paid in specie or in the notes of the bank making the loan, the note given in pursuance of this agreement was void for usury, though the borrower stated at the time that he could make the Virginia notes answer his purpose in the payment of his debts to others. Usury consists in the unlawful gain, beyond the rate of 6 per cent, taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower. The proper subject of inquiry is, what is the lender to receive, and not always what the borrower is to pay, for the forbearance. In the course of the opinion it was said by *Judge Gaston:* "If the agreement was that the borrower should receive the amount lent, after deduction of the discount, in notes known to be depreciated

at their nominal value, and at the expiration of the term should repay that amount in lawful money, or in a currency less depreciated than that in which it was advanced, without further explanation, an assurance to carry that agreement into execution would be usurious. It is manifest that by that assurance there is reserved to the lender, after taking out the legal discount, the difference between the actual value of what was lent and what is to be returned. This is prohibited gain." And again: "The proper subject of inquiry is what is the lender to receive, and not always what the borrower is to pay, for the forbearance. Where the entire gain of the lender is derived from the borrower, the profit of the former and the loss of the latter are necessarily commensurate. But it is always safer to apply, when we can, the standard given by the law than to make use of any other, however exactly in general it may appear to correspond therewith." Relying upon *Ehringhaus v. Ford, supra,* this Court, in *Bank v. Ford,* 27 N. C., 692, held that every attempt by a bank to put upon a borrower bank bills not its own, and below par at the time and place, is usurious, unless the bank by its contract of loan engage to make the notes good as cash. *Judge Gaston* once observed: "If by an agreement it was intended to obtain in fact a greater compensation for the money lent than the statute allows, the law pronounces the agreement corrupt, whatever misapprehensions might have prevailed as to the construction of the statute, or however free the arrangement from every taint of moral turpitude. This may be hard, but thus the law is written and we must obey it." *Ehringhaus v. Ford, supra.* See, also, *Grant v. Morris,* 81 N. C., 150; *Burwell v. Burgwyn,* 100 N. C., 389; *Miller v. Ins. Co.,* 118 N. C., 612; *Yarborough v. Hughes,* 139 N. C., 199. We virtually held, at this term, in *Bank v. Wysong, Miles & Co.,* that a transaction like the one involved in this case was usurious.

2. While the transaction is usurious and the plaintiff can recover only the principal of the debt (*Barnet v. Bank,* 98 U. S., 555), the defendant cannot counterclaim for twice the amount of interest actually paid, because the Federal court of last resort, whose decisions upon the construction of the statute are both authoritative and conclusive upon us, has decided in several cases that the recovery cannot be had by way of counterclaim, but that payment of the penalty can be enforced only by a separate and independent action "in the nature of an action of debt." The principle is well stated by that Court in *Barnet v. Bank, supra* (25 L. Ed. of U. S. S. C., at pp. 212, 213), as follows: (1) Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. (2) Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action

against the offending bank, brought by the persons paying the same or their legal representatives. The statutes of the States upon the subject of usury may be laid out of view. They cannot affect the case. Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Bank v. Dearing,* 91 U. S., 29 (23 L. Ed., 196). . . . The third defense set forth the like payment, and there is a claim to recover double the amount paid by way of counterclaim in the pending suit on the bill. This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties. While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case and mislead the jury to the prejudice of either party." In *Schuyler Nat. Bank v. Gadsden,* 191 U. S., 451 (4 L. Ed., 258), the Court, through *Justice White,* said: "The question for decision is, Did the Supreme Court of Nebraska rightly decide that the controversy concerning usurious interest paid was to be governed by the statutes of Nebraska on that subject, and not by the laws of the United States on the same subject, as expressed in ch. 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493)? We say this is the sole question, because it is undoubted that if the rights of the parties are to be determined by the laws of the United States, the ruling below was wrong. This results from the prior adjudications of this Court, holding that where usurious interest has been paid to a national bank the remedy afforded by ch. 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493), is exclusive, and is confined to an *independent* action to recover such usurious payments. *Haseltine v. Central Nat. Bank,* 183 U. S., 132, 46 L. Ed. 118, 22 Sup. Ct. Rep. 50, and cases cited." The Court then held that the Nebraska court should have laid out of view the State law, and determined the rights of the parties according to the law of the United States, which is that the penalty cannot be recovered by counterclaim but *only* by a *separate* and *distinct* action. The cases in the highest Federal court have been perfectly uniform to this effect, and we cannot disregard them, but it is our duty to follow the decisions of that court, though we may radically disagree with the reasoning. These are the cases: *Barnet v. Bank,* 98 U. S., 555; *Bank v. Dearing,* 91 U. S., 29; *Driesbach v. Bank,* 104 U. S., 52;

Stephens v. Bank, 111 U. S., 197; *Bank v. Morgan,* 132 U. S., 141; *Haseltine v. Bank,* 183 U. S., 132; *Bank v. Gadsden,* 191 U. S., 431, and perhaps others. Those above cited are sufficient to show that the rule of construction in respect to this matter has been well established so that we cannot depart from it, it being the law and as much so as if the very words, "by a separate and an original action," had been inserted in the statute. We must adopt that construction by following the highest judicial court, as said by us at the last term, through *Justice Hoke,* in *Belch v. R. R.,* 176 N. C., 22, where it was held that our rule cannot prevail where there is, according to the construction of the highest Federal court, provision to the contrary in the Federal statute; citing *U. S. v. Boomer,* 183 Fed. Rep., 726. This construction of the Federal statute (U. S. Rev. Stat., sec. 5198) as to usury has been so firmly settled that State courts, which had held otherwise, reversed their decisions when *Bank v. Dearing, supra,* and *Bank v. Barnet, supra,* were decided, and attention is called to that fact by the U. S. Supreme Court in one of its decisions. Notable instances of such reversals are *Haseltine v. Bank,* 155 Mo., 58 (aff. in 183 U. S., 132); *Bank v. Bushane,* 96 Pa., 340; *Bank v. Lewis,* 81 N. Y., 15; *Caponigri v. Altieri,* 165 N. Y., 255; *Huggins v. Bank,* 24 S. W., 926. This Court, in *Oldham v. Bank,* 85 N. C., 241, holds that we are to be governed by the ruling of the Federal court of last resort, *Justice Ruffin* saying: "The result of the decisions, both of this and the Supreme Court of the United States, is that no State law upon the subject of usury can be made to apply to national banks, and that the only law which touches them in this respect is the provisions of the statute under which they are organized. The construction given to those provisions, too, by the Court must be respected and accepted by every other tribunal, seeing that it is the court of last resort whose jurisdiction extends to the subject. And it is well, perhaps, however some of its determinations may differ from preconceived opinions, that we have a Court whose judgments in such matters can have universal prevalence." He then refers to *Barnet v. Bank,* 98 U. S., 555, as deciding that usurious interest paid to a national bank cannot be pleaded by way of set-off or payment on the principal of the debt, the sole and exclusive remedy being by a separate and simple action of debt unmixed with any other matter, and follows that decision. He further says: "Influenced by this decision (*Barnet v. Bank, supra*), as we feel ourselves to be, the Supreme Court of Pennsylvania in *Bank v. Dushone,* 96 Pa. St., 340, recently decided, made a similar ruling, by which it overruled many of its previous adjudications. As we read the decision, it goes to the full length of saying that in an action brought by a national bank the plea of usurious interest paid, whatever be its form, can avail nothing, and that no action for a like cause, of what-

ever nature, lies against such an institution save the one given in terms by the statute." The Court of Appeals of New York held, in respect to this question and the Federal statutes of 1882, that in an action brought to recover the amount of a promissory note discounted by a national bank, it cannot be set up by way of counterclaim or set-off that the bank, in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than that allowed by law. The remedy in such case is a separate action of debt to recover back twice the amount paid. The rule laid down in this case upon a former argument (*Nat. Bank of A. v. Lewis,* 75 N. Y., 516) was modified, as above, in conformity with the decision in *Barnet v. Nat. Bank* (98 U. S.) (8 Otto), 555, which the Court held to be controlling. Although State courts have concurrent jurisdiction with the Federal courts in actions by and against National banks, in an action in a State court the practice and pleadings prescribed by the Legislature of the State in regard to a counterclaim or recoupment cannot be resorted to, so as to defeat the object and intention of a Federal enactment. The provision of the U. S. Statute (sec. 914) that the practice, pleadings, forms and modes of proceedings in civil cases, in the Circuit and District courts, shall conform, as near as may be, to those existing at the time in the courts of record of the State, has no application in such case; it cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character. Where, however, a national bank, in the discount of a note, has usuriously reserved a sum greater than the lawful rate of interest, the amount so reserved is forfeited (U. S. R. S., sec. 5198), and cannot be recovered in an action upon the note. *Bank v. Lewis,* 81 N. Y., 15.

It is said now, and we believe by all the courts, that the local law as to pleading and procedure cannot alter the law and has no application, when the method of pleading is specially prescribed by the Federal law, which must be followed. The subject is fully considered and the authorities collected and reviewed in the notes to *Bank v. Gentry,* 56 L. R. A., 672, at pp. 689-699. We would not ourselves adopt this construction of the act of Congress were it a question before us to be decided irrespective of the ruling of the highest Federal court, as the words by an "original or independent" action in the nature of an action of debt are not used in the act, nor do we think there is anything there from which they should be implied, but that the Congress merely intended to refer to the nature of the action in which recovery should be had, as being substantially one of debt, without regard to whether it was an independent one, or by way of cross-bill or cross-action or counterclaim. There is no sound reason, in our opinion, why it should be so. It would seem to be more appropriate to try the question by way

of counterclaim in the action upon the debt, when the whole matter may be considered and the rights of the respective parties determined upon all the facts, and with greater precision. But we follow the decision of the highest Federal court as binding upon us, without regard to its reasoning or the mental process by which it reached the conclusion we have stated, which was the course taken by the Court in *Higgins v. Cit. Nat. Bank,* 24 S. W. Rep., 926, and by many other courts. Our cases holding that unlawful interest paid may be recovered back by way of counterclaim have no application, as they refer to our own statutes, which now expressly give that remedy. *Bank v. Ireland,* 122 N. C., 571. That case dealt with our usury statute (Code, sec. 3836), and was founded upon *Smith v. B. and L. Asso.,* 119 N. C., 257, and not upon the Federal statute, and even if applicable, which it is not, we could not disregard the decisions of the Federal Supreme Court in such a matter. The United States Statute of 1882 is equally inapplicable. It only confers jurisdiction on the State courts of suits for or against national banks, and as said in *Kinser v. Farmers Nat. Bank,* 58 Iowa, 728, the design of the Congress was to confer jurisdiction upon the proper State court, and to leave it, after the action is begun, to be governed by its own mode of proceeding, when not in contravention of any special provision of the Federal law upon the subject. It was clearly not intended to repeal the provision as to how actions for usurious interest actually paid should be brought. Several of the cases cited by us were brought upon transactions which occurred after the act of 1882 was passed, and still the former rule was applied, as if that statute had no effect whatever upon the question.

The other exceptions are untenable or without merit. It would seem that they now become irrelevant, as we will direct judgment to be entered for the plaintiff according to the finding upon the fourth issue and the prayer of his complaint, that is, for the principal of the debt without interest, except as specified in that issue. But we discover no error in the other rulings to which exceptions were taken. A decision of the question raised by the plea of the limitation contained in the Federal statute becomes, of course, unnecessary.

It all results in this, that the counterclaim must be dismissed, and that the judgment be modified so as to strike therefrom all recovery upon the same, and that judgment be entered for the plaintiff upon the fourth issue and the answer thereto, without deduction therefrom, or diminution thereof, by reason of any penalty for unlawful interest paid, the amount to be inserted in the judgment, being $10,449.54, with interest from 15 January, 1918. This gives the defendant the benefit of the forfeiture of interest, but not of the penalty, under the Federal statute.

Plaintiff's appeal. Error. Defendant's appeal. No error.

BANK v. WYSONG, MILES & CO.

(Filed 7 May, 1919.)

ACTION heard by *Lane, J.*, upon the pleadings and a case agreed, at February Term, 1919, of GUILFORD.

King & Kimball for plaintiffs.
Jerome & Scales for defendant.

WALKER, J. The facts in this case and the questions presented are, in all essential respects, like those in the case of the Planters National Bank (of Richmond, Va.) against the same defendants (numbers 391 and 392), and sufficiently so at least for our decision here to be the same as in that case.

Plaintiff appealed in this case, and it must, therefore, be certified that the court erred in its judgment upon the facts stated. Let judgment be entered below in accordance with the principle as declared in the case of the *Planters Bank v. Wysong, Miles & Co., supra.*

Error.

MRS. ELLIE S. KEESLER v. MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 7 May, 1919.)

1. **Insurance—Contracts—Interpretation—Lex Loci—Contractus.**

   In an action brought in the courts of this State to recover upon a matured policy of life insurance issued and accepted by the insured in a sister State where the insured lived and died, the validity of the contract will be determined under the decisions of the courts of such other State.

2. **Contracts — Lex Loci Contractus — Courts—Decisions—Evidence—Questions of Law—Trials.**

   Where the decisions of a sister State are controlling upon a contract made there but sued upon in the courts of this State, our courts will not take judicial notice of such decisions, but require them to be proved as other facts in the case should be established; and when so established their interpretation is a matter of law, to be decided or declared by our courts.

3. **Contracts — Insurance — Lex Loci Contractus—Courts—Decisions—Laws of Other States—Georgia.**

   It is *held* in this case that, under the decisions of the Supreme Court of Georgia the delivery of a life insurance policy by the agent of the company to the insured, while the latter was upon his bed with a sickness from which he afterwards died, did not bind the insured upon the

policy contract contrary to a provision therein, and in the application for the policy, that it would be invalid under the circumstances, and under a provision of the policy that the act of the agent could not therein vary the terms of the contract, there being no element or suggestion of fraud in the transaction.

APPEAL by plaintiff from *Harding, J.*, at the November Term, 1918, of MECKLENBURG.

This action was brought by the plaintiff to recover of the defendant $3,000 claimed to be due on a policy of insurance upon the life of Augustus L. Keesler, in favor of the plaintiff, alleged to have been issued by the defendant and delivered to the insured a few days prior to his death.

It is admitted by both parties that the insured was a resident of the State of Georgia at the time the application for insurance was made, and that said application was solicited and obtained by a local agent of the company in Georgia, and that thereafter the policy issued thereon was attempted to be delivered to the insured in the State of Georgia, and that therefore the rights of the parties to this action must be governed and determined by the laws of the State of Georgia.

The application was made and signed by the applicant on 30 August, 1917, and the policy was physically delivered to the insured by the local agent (Lawton) in Macon, Georgia, on 8 September, 1917, while he was confined to his bed in his home, and the premium then paid, the agent at the time knowing he was sick.

As soon as defendant discovered that there had been a change in the health of the applicant, between the date of the application and attempted delivery of the policy, it immediately denied to the plaintiff its liability on the policy, tendered to her the return of the premium paid thereon, and demanded a surrender of the policy, all of which was refused, and when this action was brought and the answer filed the defendant deposited with the clerk of the court the amount of said premium to keep said tender alive.

No executive officer of the company had any notice whatever of any change in the health of the applicant after the date of the application until long after his death.

The applicant became sick on 4 September, 1917, and remained continuously sick from that date until the 15th of said month, when he died.

For the purpose of proving the law of Georgia applicable to the facts of this case, the defendant introduced sections 2499, 2480, 2481, 2483, and 6207 of the Civil Code and the opinion of Shepard Bryan, a practicing attorney in Atlanta, which, by consent of plaintiff's counsel, was offered in lieu of Mr. Bryan's sworn testimony in the case. Also the various decisions of the Supreme Court of Appeals of the State of Georgia referred to in said opinion.

The application, which was signed by the insured, among other things provides:

"The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health and unless also the policy shall have been delivered to and received by me during my continuance in good health, except in case a conditional receipt shall have been issued, as hereinafter provided." (There was no such conditional receipt issued.)

The application also further provides:

"I agree that no agent or other person, except the president, vice-president, a second vice-president, a secretary or the treasurer of the company has any power on behalf of the company to make, modify, or discharge any contract of insurance, to extend the time for payment of premium, waive any lapse or forfeiture of any of the company's rights or requirements, or to bind the company by making any promises respecting any benefits under any policy issued hereunder, or by accepting any representations or information not contained in this application."

The policy, in addition to containing a clause similar to the first above quoted, also further provides:

"This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto," etc.

The defendant contended that the plaintiff could not recover because it was admitted the policy was delivered when the insured was not in good health, while the plaintiff contended that although the insured was not in good health at that time this fact was known to the agent of the defendant, and the defendant replied that by the terms of the application and the policy the agent had no authority to waive any provision of the policy.

The issue as to waiver was as follows:

7. Did the defendant, through his agent Lawton, waive the clause in the application and policy of insurance providing that said policy should not take effect unless and until said policy should be delivered and the first premium paid thereon during the good health of the applicant, by delivering said policy with knowledge that the said Keesler was, at said time, confined to his bed or room, suffering from an ailment of more or less temporary or serious nature? Answer: "No."

The court instructed the jury on this issue as follows:

"The court instructs you that this case is being tried under the laws of the State of Georgia, the policy having been issued in the State of Georgia, the deceased having died in the State of Georgia, a resident of the State of Georgia at the time of his death, and the court is of the opinion that the law as laid down by the Supreme Court of Georgia in

Reese v. Ins. Co. is the law of Georgia applicable to this case, and that the law laid down by the Supreme Court of Georgia in *Few v. Ins. Co.* is not the law applicable in this case. Therefore the court instructs you, under the evidence of the plaintiff, if you believe the plaintiff, to answer the seventh issue 'No.'" and the plaintiff in apt time excepted.

Judgment was entered upon the admitted facts and upon the answer to the seventh issue in favor of the defendant, and the plaintiff appealed.

J. D. McCall attorney for plaintiff.

Frederick L. Allen, Jas. H. Pou, and Cansler & Cansler attorneys for defendant.

ALLEN, J. The contract of insurance on which the plaintiff sues was made in the State of Georgia where the insured lived and died, and "It is settled that 'Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made.' *Scudder v. Nat. Union Bank,* 19 U. S., 406." *Cannady v. R. R.,* 143 N. C., 442. See, to the same effect, *Satterthwaite v. Doughty,* 44 N. C., 314; 12 C. J., 448; 5 R. C. L., 931.

We must then inquire into the laws of our sister State, and the rule prevailing with us is that "The existence of a foreign law is a fact. The court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect, is the province of the court." *State v. Jackson,* 13 N. C., 566.

"The court is presumed to know judicially the public laws of our State, while in respect to private laws, and the laws of other States and foreign countries, this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved *as facts,* for otherwise the court cannot know or take notice of them. This is familiar learning. 3 Wooddeson's Lec., 175. . . .

"If the law be written, and its existence is properly authenticated, the court, availing itself of the aid of the judicial decisions of the country, puts a construction on it, and explains its meaning and legal effect, and the jury have nothing to do with it save to follow the instructions of the court as if it was our own law. If the law is unwritten, and its existence is presumed or admitted, then the jury have nothing to do with it. . . .

"But if the existence of an unwritten law of another State or foreign country is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the *credibility of the witnesses,* and it is the province of the court to inform the jury as to the construction, meaning, and legal effect of the law, supposing

its existence to be proven; and to this end the court should avail itself of the judicial decisions of the State or country."

To prove the fact, that is, the existence of the law, the decisions of the highest appellate court of Georgia, a statute of that State, and the opinion of Mr. Shephard Bryan, a distinguished lawyer of Atlanta, used as a deposition by consent, were introduced in evidence, and as none of these sources are impeached, it becomes for us a question of construction and interpretation.

In *Reese v. Fidelity Mutual Life Ins. Co.,* 111 Ga., 482, the question now presented was decided in favor of the contention of the defendant on facts almost identical with those in the present record.

In that case there was provision in the application and the policy that the policy should not take effect unless the first premium was paid and the policy delivered during the continuance in good health of the insured, and in both the application and policy there was the limitation on the authority of the agent as to waiver, and it was held that there was no liability on the insurance company because the policy was delivered when the insured was not in good health although the agent knew of his physical condition.

In the *Reese case,* after discussing two Georgia cases, the Court said: "There was no pretense in either of those cases that the authority to make the waiver had been expressly withheld from the agent as was done both in the application and in the policy in the case at bar. Under the express terms of the agreement in this case the agents had no authority to make such waiver. The policy declared that 'No agent of the association has any power to make, alter, or discharge contracts, waive forfeitures, or grant credit; and no alteration of the terms of this contract shall be valid, and no forfeiture hereunder shall be waived, unless such alteration or waiver be in writing and be signed by the president of the association'; and the application contained substantially the same provision. More distinct and unequivocal language could hardly have been used to express the mutual understanding of the parties to the contract. The applicant was an intelligent business man; he signed the application; and in the absence of any want of opportunity to read it, or of any suggestion of fraud practiced upon him, it must be conclusively presumed that he fully understood the entire transaction.

"It is a familiar rule that a principal may limit the power of his agent, even within the apparent scope of his authority, so that the agent cannot, in violation of the restriction, bind his principal when dealing with one who has notice of the limitation. Here the applicant expressly agreed in writing that no agent of the association should have authority to grant credit and no alteration of the contract of insurance should

be valid unless in writing and signed by the president of the association, and there was no pretense that the president ever signed such writing. If in violation of these specific provisions of the contract it were held that the agent of the association could vary the terms and grant credit for the first premium, instead of requiring its payment in cash, then must we subscribe to the rule, which seems to be supported by some adjudicated cases, that an insurance agent, unlike all other agents, may bind his principal, although acting contrary to express instructions and dealing with one who has full knowledge of the limitations of his authority. The soundness of such a doctrine does not commend itself to our minds. It must not be thought that the established rules of the law of agency do not apply to the transactions of life insurance companies. There is no particular sanctity about the business of life or any other kind of insurance. The companies engaged in it have the right to employ agents and give to them such authority as they please. Whatever limitations are imposed upon such agents, if communicated to those dealing with them, will be binding, and if this authority be exceeded, the act will not bind the principal."

The *Reese case* was affirmed, without comment, in *Ins. Co. v. Clancy,* 111 Ga., 865, and in *Mutual Reserve Asso. v. Stephens,* 115 Ga., 194, and *Johnson v. Ins. Co.,* 123 Ga., 406, the Court saying in the *Stephens case:* "This case falls squarely within the decision rendered by this Court in *Reese v. Fidelity Asso.,* 111 Ga., 482, which was followed in *Mutual Life Ins. Co. of Ky. v. Clancy, id.,* 865," and holding according, and in the Johnson case: "In the *Reese, Clancy,* and *Stephens cases,* which were actions on policies of life insurance, the waiver sought to be set up was as to a provision that the policy should not become binding upon the company until the first premium had been paid during the good health of the insured. Unquestionably, as to a matter concerning the time when the contract is to become of force, or as to the waiver of the conditions of the policy subsequently to its issuance, the insured, by accepting the policy, would be bound by its terms, and could not set up a waiver which he was bound to know the company's agent had no power to make."

If, therefore, the *Reese case* represents the law of Georgia correctly it is decisive of the controversy between the plaintiff and the defendant, but it is insisted by the plaintiff that it has been overruled by the subsequent case of *Few v. Knights of Pythias,* which was before the Supreme Court of Georgia three times, and is reported in 136 Ga., 181; 138 Ga., 779; 142 Ga., 240, in which it was held that a condition in a *policy,* rendering it void if the first premium was paid and the policy delivered when the insured was not in good health, was waived by the receipt of the premium and delivery of the policy by an agent who knew of the

condition of the insured, notwithstanding the limitations on the power of the agent contained in the *policy.*

The two cases are not necessarily in conflict as in the *Reese case,* like ours; the provision in regard to the payment of the first premium and the delivery of the policy during the continuance in good health, and the limitation on the authority of the agent, were in the *application* as well as in the policy, while in the *Few case* they were in the policy alone, and being in the application, which was preliminary to the contract of insurance and a negotiation for it, the parties could agree upon the conditions which must exist before the policy would be in force, and at the time the policy was delivered the insured knew he was dealing with an agent of limited authority, who could not waive the condition as to good health.

If, however, there is an irreconcilable conflict the *Reese case* is still authoritative under the laws of Georgia.

In the first place it was reaffirmed in 1916, after the last appeal in the *Few case,* in *Williams v. Ins. Co.,* 146 Ga., 245, in the following language:

"The instant case is not identical in its facts with the case of *Reese v. Fidelity Mutual Life Ins. Co.,* 111 Ga., 482 (36 S. E. R., 637), but upon the controlling questions it is very similar, and we are of the opinion that the ruling there made is controlling here. The reasoning upon which this rule is based, and which is entirely applicable to the facts of the present case, is sound and supported by the authorities adduced to support the conclusions reached."

Again, the *Reese case* was by a unanimous decision in 1900, and it is not referred to in either appeal in the *Few case,* and it is provided by the Georgia Code, sec. 6207, that "Unanimous decisions rendered after said date (1 January, 1897) by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the Court, is expressly questioned and reviewed; and after such argument the Court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

This statute has been upheld in *Shephard v. Bridgers,* 137 Ga., 624, where the Court, after referring to two cases, says: "The decision in these two cases have never been reversed or formally modified, though in some decisions the cases under consideration were distinguished from those cited above. If there should be an irreconcilable conflict between them and some later decision, without any overruling or changing of the earlier decisions, under our statute the older decision would stand. Civil Code (1910), sec. 6207."

We are therefore of opinion that the plaintiff cannot recover, and that his Honor committed no error in his instruction on the seventh issue.

No error.

ANNIE E. ANDERSON v. HENRIETTA ANDERSON ET ALS.

(Filed 7 May, 1919.)

1. Husband and Wife—Deeds and Conveyances—Statutes—Probate Officer—Certificate—Mistake—Evidence.

Where the wife brings suit to set aside her deed to lands conveyed by her to her husband for failure of the probate officer to certify that it was not unreasonable or injurious to her, Revisal, 2107, and the defendants allege that this requirement was observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time is competent in rebuttal of the defendant's evidence, if he had introduced any, and immaterial if he did not do so.

2. Appeal and Error—Issues—Courts—Immaterial Issues.

It is not error for the trial judge to withdraw from the consideration of the jury issues which had been submitted to them but immaterial to the inquiry.

3. Husband and Wife—Wife's Separate Property—Betterments.

The heirs at law of the deceased husband may not recover for improvements he had placed on his wife's lands with his own money, in the absence of proof that he did so under a written contract properly probated, and with the officer's certificate required by Revisal, sec. 2107; or that he made them with the honest belief that he owned the title or that he reasonably believed that he was improving his own land.

4. Husband and Wife—Betterments—Gifts—Presumptions.

The husband has no lien upon his wife's lands for improvements he has knowingly placed thereon with his own money in the absence of a valid agreement to that effect, the presumption being that it was a gift to her.

5. Trusts—Husband and Wife—Parol Trusts—Evidence—Quantum of Proof—Burden of Proof—Debt—Parties—Executors and Administrators.

Where the husband, or those claiming under him, seeks to set up a parol trust in the wife's land in his favor, it is necessary to show the trust by "clear and convincing" evidence, though a preponderance thereof only is necessary where the husband has since died and the action is brought by his administrator, a necessary party, to recover money which the deceased husband has paid to his own use.

APPEAL by defendants from *Long, J.*, at August Term, 1918, of DAVIE.

This was an action for the recovery of a tract of land containing 30½

acres and to set aside a deed from plaintiff to her husband, Thomas M. Anderson, deceased, under whom the defendants claim, upon the ground that said deed was void because not executed with the certificate of the officer as required by Rev., 2107.

The defendants allege that the privy examination of the plaintiff in the deed to said Thomas M. Anderson was duly taken, but that by mistake and oversight he omitted to insert in his certificate that the deed was not unreasonable or injurious to her.

The defendants also allege that at the time the deed was executed by the plaintiff, Annie E. Anderson, to her husband, Thomas M. Anderson, the defendant's ancestor under whom they claim, the plaintiff held an undivided two-thirds in the 30½-acre tract in trust for Thomas M. Anderson, and that the other one-third interest therein owned individually by the plaintiff had been conveyed to her husband in consideration of the contract whereby he built a house on her land, a tract separate and distinct from the land in controversy.

The plaintiff denied that there was any trust existing between herself and husband relative to the two-thirds interest in the land, or that there was any contract whereby she was to execute a deed to him for the other one-third interest in the land, in consideration of his building a house on a separate tract.

The jury found with the plaintiff on these contentions. The court rendered judgment in favor of the plaintiff, from which the defendants appealed.

A. T. Grant, Jr., and E. L. Gaither for plaintiff.
Jacob Stewart and Holton & Holton for defendants.

CLARK, C. J. The defendants alleged in their answer that the plaintiff not only executed the deed to her husband freely and voluntarily, her privy examination being taken, but that the officer found that the same was not unreasonable or injurious to her, though by oversight and mistake he omitted to insert that finding in his certificate of probate. This was denied by the plaintiff. We cannot sustain the exception that the wife and the probate officer were permitted to testify as to what happened at the examination. This would have been competent in rebuttal if there had been evidence by defendants in support of their allegation, and there being none, this evidence was immaterial and harmless.

The defendants also excepted to the withdrawal by the court of the fourth issue, as to whether the plaintiff contracted with her husband to convey him one-third interest in the land in consideration of building for her a house on her own land; and also the fifth issue, as to the cost and expenses incurred by said T. M. Anderson in building said house.

There was no error in withdrawing these issues because it is not alleged in the answer that any improvements were made by the husband in pursuance of a written contract with his wife, probated and approved as required by Rev., 2107, and there was no evidence of such contract; and further, the defendants, as heirs at law of the husband, had no claim against his wife for improvements placed upon her land by him, for there was no proof or allegation that he believed he had title to the land upon which the improvements were placed, nor was there allegation or proof that he placed the improvements on his wife's land by mistake in the honest belief that he was improving his own land. *Pritchard v. Williams,* 176 N. C., 108.

The husband had no lien in equity because the law presumes that improvements placed upon the wife's land by the husband were a gift to her. *Arrington v. Arrington,* 114 N. C., 119; *Kearney v. Vann,* 154 N. C., 316; *Nelson v. Nelson,* 176 N. C., 191. Moreover, the defendants do not allege that any improvements were placed upon the land in controversy, and there is no evidence to that effect, but all the evidence showed that the house was built upon land admittedly the property of the wife. Besides, the administrator of T. M. Anderson was not a party to this action, and if there were any debt due him for such improvements it could not be recovered except by the husband's administrator.

Exception 6 cannot be sustained for it is merely to a statement by the court of the contention of the plaintiff. Exception 7 is because the court instructed the jury that if the husband paid off an encumbrance upon his wife's land there is a presumption in law that such payment of money was a gift of the wife. *Arrington v. Arrington,* 114 N. C., 119. The court told the jury, however, that if there was an agreement between them before marriage there would be no such presumption.

Exceptions 8 and 9 are that the court told the jury that the evidence required for the establishment of the parol trust alleged should be "clear and convincing." This rule was so laid down in *Harding v. Long,* 103 N. C., 1. It is true that as to the third issue, whether T. M. Anderson paid the purchase money for the said two-thirds interest, as alleged in the answer, this could be proven by the preponderance of the testimony if this were an action by the administrator of the husband to recover a debt, but it was in this action (to which the administrator was not a party) a necessary part of the allegation that the wife held said two-thirds interest under a parol trust for the husband, and therefore the charge was correct that this, as the basis of such parol trust, must be proven by testimony that was "clear and convincing."

No error.

THE MORGANTON MANUFACTURING AND TRADING COMPANY, INC., v. FOY-SEAWELL LUMBER COMPANY, INC., ET AL.

(Filed 7 May, 1919.)

1. Appeal and Error—Reference—Attachment—Presumptions—Findings.

Where the referee has found, in an action wherein the defendant's property had been seized under an attachment, that the attachment was valid, and the trial judge has ruled, upon full consideration of the report, that it had been properly issued, and there are no special findings made by or requested of him, the Supreme Court, on appeal, will assume that he found the necessary facts, under the evidence, to support his order.

2. Attachment—Reference—Fraud—Evidence—Appeal and Error.

Where the affidavit in attachment alleges that the defendant was shipping beyond the State manufactured lumber in breach of his contract with the plaintiff not to do so, but to transfer the bills of lading to him, and was continuing to do so, secretly, surreptitiously, and in a hasty manner, it is sufficient to sustain a finding of the trial judge, in passing upon the report of the referee, that the attachment had properly been issued, and renders immaterial and harmless a similar finding of the referee upon the same question; and in passing upon the question of the sufficiency of the evidence to sustain the finding of fraud, some latitude will be allowed on appeal, in support of the finding.

3. Attachment—Custodia Legis—Judgment—Execution—Evidence—Fraud—Statutes.

Where defendant's property has been seized under attachment in an action and held in *custodia legis* until final judgment in plaintiff's behalf, and the decision upon the question as to whether there was sufficient evidence of fraud to sustain the attachment having been adverse to the defendant and approved by this Court, the effect of an execution upon the judgment, when placed in the sheriff's hands, Rev., sec. 784, is that of a *venditioni exponas* to sell the property which had been seized in attachment.

4. Same—Issues.

Where property of the defendant has been seized and is held in *custodia legis* under a writ of attachment until judgment is rendered in the main action, if plaintiff recovers, it is the duty of the sheriff, under the statute, to sell the property seized in attachment, when execution is issued upon the judgment and received by him.

5. Appeal and Error—Reference—Findings—Evidence.

The findings of fact by a referee, which were made upon sufficient evidence and fully considered and approved by the trial judge, will not be reviewed in this Court on appeal.

6. Attachment—Decisions—Res Judicata—Judgments.

A decision on a motion to vacate an attachment is *res judicata* until reversed.

ACTION heard before *Webb, J.*, upon exceptions to a referee's report at December Term, 1918, of BURKE.

The plaintiff alleged that the defendants are indebted to it in the sum of $1,917.10, being the balance due on an account for manufacturing the lumber of defendants at its plant and for other services rendered in connection therewith. Plaintiff applied for a warrant of attachment upon the ground, as stated in its affidavit, that the defendant, Foy-Seawell Lumber Company, either had assigned, disposed of or subscribed its property, or was about to do so, with intent to defraud its creditors. A warrant of attachment was issued and levied upon the property of the defendant company described in the sheriff's return thereon. Plaintiff alleged, in its affidavit, that the defendant had promised to assign to it the bill of lading for certain lumber, on which plaintiff had worked, before the same was shipped, and that defendant had failed to comply with its promise, but, on the contrary, had shipped out the lumber in a car without plaintiff's knowledge or consent, and the car containing the lumber was proceeding on its journey to a point without the State and the jurisdiction of the court when the warrant was levied upon the lumber at an intermediate station.

Defendant moved to vacate the attachment for the reason that the affidavit did not sufficiently state the grounds upon which plaintiff based its belief that defendant was disposing of its property with intent to defraud its creditors. The court refused to vacate the attachment, and defendant excepted and appealed, but did not prosecute its appeal, and abandoned it.

The case was referred to Mr. W. T. Morgan, of Marion, N. C., to take and state an account of the transaction, as alleged in the pleadings, which he did, and then made his report to the court. Exceptions were filed thereto by the defendant which, upon being heard by the judge, were overruled, and defendant excepted. There were six exceptions, and all but the sixth—which was merely formal—and the fourth and fifth, which will be hereinafter separately considered, were taken to the referee's findings of fact, which upon review were approved by the judge.

Judgment was rendered for the plaintiff, and the property attached was (by consent without prejudice) ordered to be sold, and the court then adjudged that it be applied to the payment of the judgment. Defendant excepted and appealed.

Avery & Ervin for plaintiff.
Lee & Ford for defendants.

WALKER, J., after stating the facts: We doubt if the judgment is a final one, so that an appeal will lie from it, as there were other things to be done, but waiving this question for the present, we will consider the exceptions so as not to prolong the litigation.

The referee found that a valid attachment had been issued and levied upon the defendants' property, and it is objected by the latter that this was not a finding of fact as to the fraud in disposing of the property. But we regard this as immaterial. The judge correctly ruled that the attachment was properly issued, and in the absence of any special findings of fact by him we must assume that he found those facts which would support his order. *Lumber Co. v. Buhmann,* 160 N. C., 385; *Gardiner v. May,* 172 N. C., 192; *McLeod v. Gooch,* 162 N. C., 122; *Pharr v. R. R.,* 132 N. C., 423.

If the defendants desired a specific finding of the facts it should have requested it. *Lumber Co. v. Buhmann, supra; Gardiner v. May, supra,* citing *McLeod v. Gooch, supra.* But we need not longer dwell on this matter, as upon an examination of the affidavit we are of the opinion that it contains statements from which he could fairly and reasonably find, as he evidently did, that the defendant had not only violated its plainly expressed agreement that it would not remove the lumber without assigning the bill of lading to the plaintiff, but that the defendant had actually shipped its property secretly and surreptitiously, with the intent to hinder, delay, and defeat its creditors. Why should it have shipped, in the manner it did, without transferring the bill of lading in direct breach of its promise and without giving the plaintiff any notice of what it intended to do? This was a very suspicious circumstance, and the defendant's entire conduct was calculated to impress the judge with the conviction that its purpose was not an honest one, as it had attempted, as fast as it could do so, to put its property beyond the reach of the plaintiff, when it was caught in the act. In passing upon such questions we are permitted some latitude in finding the fact of fraud. There was no reason for such hasty and clandestine action if the intent was a fair and innocent one. Our conclusion that the judge was right, in any view, when he refused to vacate the attachment, makes it immaterial to discuss the exceptions as to the finding of the referee upon the same question. The fraudulent disposition of its property by defendant, as alleged in the attachment proceedings, was entirely collateral to the main issue in the case, which was whether defendant was indebted to the plaintiff, and if so, in what amount. Such an attachment is intended by the law to place the property in its custody as a security for the payment of the debt, if finally there is a judgment for it.

The statute provides that "in case judgment be entered for plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him if it shall be sufficient for that purpose," and then the method of doing so is prescribed. Rev., sec. 784. It has been held that attachment is simply a levy before judgment to preserve and make

effective the ultimate recovery of the plaintiff, and when execution is issued upon the judgment, it is his duty to sell the attached property. *Mfg. Co. v. Steinmetz,* 133 N. C., 194 (by *Chief Justice Clark*), citing *Gamble v. Rhyne,* 80 N. C., 183. Where the court has the custody of property it will be retained to await the result of the action and to satisfy any judgment that may be recovered. *Lemly v. Ellis,* 143 N. C., 200. Under this section the sheriff, upon receiving execution, is directed to sell the property previously attached and is invested with as much power and authority to act in the premises as if an execution, in the form of a *venditioni exponas,* had been issued to him specially commanding him to sell the particular property. *May v. Getty,* 140 N. C., 310. It was not alleged that the debt itself was fraudulently contracted, and therefore no *issue* of fraud was involved. The fraud consisted in removing the property with an intent to defeat a recovery of plaintiff's claim, and that was a collateral fact. *Mfg. Co. v. Steinmetz, supra,* is directly in point. The second head-note states: "Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution."

The referee found that the attachment was validly issued, and the presiding judge affirmed all of his findings of fact and conclusions of law. As to the referee's findings of fact, there was evidence to support them, and they were fully considered and approved by the judge. When this is the case, we do not review them here. The authorities to this effect are numerous. *Battle v. Mayo,* 102 N. C., 413; *Lewis v. Covington,* 130 N. C., 541; *Moore v. Westbrook,* 156 N. C., 482; *Thompson v. Smith,* 160 N. C., 256; *McCullers v. Cheatham,* 163 N. C., 61; *Montcastle v. Wheeler,* 167 N. C., 258; *Simmons v. Groom, ibid.,* 271; *Comrs. v. Abee Bros.,* 175 N. C., 701. We have examined the evidence and find that it supports the referee's findings of fact. The point was made that the decision, on the motion to vacate the attachment, is *res judicata. Roulhac v. Brown,* 87 N. C., 1; *Pasour v. Lineberger,* 90 N. C., 159. This is true so long as the order is unreversed, but it is not material in the view taken by us of the case. We need not decide whether another motion to vacate could have been made upon new facts, as no such motion was made.

There was no error in the rulings and judgment below.

No error.

SHIPPLETT CONCRETE COMPANY v. PIEDMONT TRACTION COMPANY AND PIEDMONT AND NORTHERN RAILWAY COMPANY.

(Filed 14 May, 1919.)

1. Contracts—Words Employed—Effect—Interpretation.

The effect of a written contract, as gathered from its terms, will control whatever the parties thereto have therein otherwise called it.

2. Same—Railroads—Transfer of Contract—Substitution of Contractors—Waiver—Parties.

A contract for the building of a bridge for a railroad company provided that the contractor shall not sublet or transfer it or any part thereof without the written consent of the civil engineer, and that any extension of time given by the railroad company beyond that specified would not relieve the contractor for damages caused by his failure to have then completed it. The contractor, with the knowledge of the railroad, and as gathered from the written terms, transferred his contract and all rights thereunder to the plaintiff, who was independently and diligently prosecuting the work when stopped by the railroad company, the defendant, and the plaintiff now sues to recover the consequent damages for the defendant's breach: *Held*, the written consent of the engineer was waived by the defendant under the circumstances, and though the parties to the transfer used the terms "subcontractor" and "sublet" therein, it was in legal effect a substitution of the plaintiff for the original contractor and makes the plaintiff the real party in interest.

APPEAL by defendants from *Adams, J.*, at February Term, 1919, of MECKLENBURG.

The plaintiff recovered judgment for damages for breach of contract against the defendant railroad company. The plaintiff sued as the assignees of the contract which said railroad company had made with Porter & Boyd Co. for building a railroad bridge across the Catawba near Mount Holly.

In the flood of 1916 the defendant's railroad bridge at that point was washed away, and in August, 1916, it contracted with Porter & Boyd to reconstruct the concrete piers and abutments upon which the bridge was to be rebuilt which, according to the contract, was to be completed within 110 working days from the date of the contract. It is admitted that this time expired on 20 January, 1917.

The contract provides that "The said contractor shall not sublet or transfer this contract, or any part thereof, to any person (except for the delivery of material) without the written consent of the engineer"; and further, it was agreed and understood that "if the contractor shall not complete said work within the time herein specified, and the company shall, notwithstanding such failure, permit said contractor to proceed with or complete said work as if such time had not elapsed, such permission shall not be deemed a waiver in any respect by the company

of any forfeiture of any liability for damages or expense thereby incurred, arising from such noncompletion of such work within the time specified, but such forfeiture or liability shall still continue in full force against said contractor as if such permission had not been granted." The contract further contained the usual provisions under which the work might be taken over upon the certificate of the engineer that the contractor was in default or not properly proceeding with the work, etc.

Porter & Boyd began the work and continued on it till 11 November, 1916, when they entered into a contract on that date with the plaintiff company, who continued the work. The plaintiff company contends that by virtue of this contract it became the assignee of the Porter & Boyd contract and fully performed it, and is entitled to recover in this action against the defendant. The latter contends that the plaintiff company was a subcontractor under Porter & Boyd and as such is not entitled to maintain this contract; and further, that if the contract was assigned to plaintiff it failed to perform the same and finally abandoned the work.

The jury found upon the issues submitted that the defendant railroad company knew of the terms of the contract between Porter & Boyd and the plaintiffs, and assented that the plaintiff company should take over the contract between the defendants and Porter & Boyd and complete the same without the written consent of the engineer, and that by consent of the defendant railroad company the time was extended for the performance of the contract as alleged in the complaint, but the defendant wrongfully and unlawfully terminated said contract whereby the plaintiff was entitled to recover $11,464.44, with interest at 6 per cent from 6 February, 1917. The jury allowed the plaintiff no profits on the unfinished work.

Judgment was rendered in accordance with the verdict, and the defendant railroad company appealed.

Clarkson, Taliaferro & Clarkson, Archibald Robertson, Tillett & Guthrie for plaintiff.

Osborne, Cocke & Robinson for defendants.

CLARK, C. J. The jury find upon the oral testimony, which is uncontradicted, and upon the written evidence as well, that the plaintiff took over the contract between Porter & Boyd and the defendant with the full knowledge and consent of the defendant railroad company. It also appears in the evidence that the plaintiff actively engaged in executing the contract, working day and night with all the force and machinery that could reasonably be employed; that the defendant railroad company expressly agreed to an extension of time, but afterwards unlaw-

fully terminated the contract and ejected the plaintiff from the premises.

The first two issues as to execution of the contract between Porter & Boyd and the railroad company, and later between Porter & Boyd and the plaintiff, were answered "Yes" by consent. The jury found, in response to the third issue, that the defendant railroad company, being informed of the terms of the contract between Porter & Boyd and the plaintiff, assented that the plaintiff should take over such contract from Porter & Boyd and complete the work without written consent of the engineer. There was evidence to justify this finding and also to support the verdict on the fourth issue that the railroad company agreed with the plaintiff to extend the time within which the work was to be completed, as alleged in the complaint. Indeed, the evidence on this point was not contradicted. The fifth issue, that the defendant railroad company, in violation of the agreements found in the third and fourth issues, wrongfully and unlawfully terminated in the contract, was uncontradicted. The estimate of the damages was based by the jury upon evidence.

The chief controversy as to the law is based upon the refusal of the court to charge that the contract between the plaintiff and Porter & Boyd made the plaintiff a subcontractor. This is the main proposition presented by the defendants in this Court.

The contract recites that Porter & Boyd "sublet the masonry and other work required for the reconstruction of the bridge" to the plaintiff "on the terms and conditions enumerated in the contracts between said Porter & Boyd and the railroad company," and that said Porter & Boyd turned over all the material and appliances of every kind on the premises to the plaintiff and all vouchers, and the plaintiff agreed to pay for the use of the equipment and material thus turned over, and for the work already done by Porter & Boyd, the sum of $8,000. In consideration of which the said contractors (Porter & Boyd) agreed to turn over to the said subcontractor (the Shipplett Concrete Company) the entire amount set out in the contract "between said Porter & Boyd and the defendant railroad company for the construction of said work."

It is true that the contract between Porter & Boyd and the plaintiff designated the latter as "subcontractor" but the contract shows that the word "sublet" is used in the place of the word "assign." A contract is what its terms make it and not what the parties style it. The terms of this contract made it a complete assignment and transfer of all of Porter & Boyd's interest in the work, and put the plaintiff in their shoes. The contract turned over all the work to the plaintiff and the plaintiff was to receive all the pay. The defendant railroad company, with knowledge of this contract, assented that the plaintiff should take over the work and complete it, and agreed to an extension of time.

In *Ormond v. Ins. Co.,* 145 N. C., 140, the Court said: "No particular form of words is essential to effect an assignment. . . . An assignment is substantially a *transfer,* actual or constructive, with clear intent at the time to part with all interest in the thing transferred, with a full knowledge of the rights so transferred."

In *Temple Co. v. Guano Co.,* 162 N. C., 87, *Mr. Justice Walker* said: "We must search for the purpose in the instrument and be governed by its language, it is true, but it should not be subjected to any strained or narrow construction, for he who stops at the letter goes but skin deep into the meaning."

By analogy, 1 Wood Landlord and Tenant, 714, says: "If the tenant parts with the demised premises for the whole of the term, although his deed purports to be an under-lease, yet it is in legal effect an assignment."

In *Cameron-Tobin Co. v. Tobin,* 104 Minn., 333, it is held: "Wherever a lessee grants or transfers the whole term for which the premises are leased to him, leaving no reversionary interest in himself, it amounts to an assignment and is not a sublease. This results by operation of law, without regard to the form of the instrument. . . . Here what purported to be a sublease was in fact an assignment of plaintiff's interest to the premises leased by it."

Under the contract the plaintiff was to do the work and was to get the pay. Porter & Boyd agreed that they would "turn over to the subcontractors the entire amount set out in the contract." If the vouchers were made out in the name of Porter & Boyd, this contract required them to turn these vouchers over to the plaintiff, which the evidence shows that they did.

The fact that the plaintiff, under its contract with Porter & Boyd, was to receive all the pay and that the defendant railroad company, with knowledge of said contract, assented thereto and extended the time makes the plaintiff the real party in interest. The fact that the words "subcontractor" and "sublet" were used does not alter the legal effect of the transaction by which the plaintiffs became in effect entirely *substituted* for Porter & Boyd in completing the work.

No error.

J. R. REYNOLDS, ADMINISTRATOR v. LLOYD COTTON MILLS.

(Filed 14 May, 1919.)

1. **Domicile—Executors and Administrators—Intent—Change of Residence—Clerks of Court—Statutes—Burden of Proof.**

In order to effect a change of "domicile," as distinguished from "residence" or "inhabitancy," within the intent and meaning of our statute giving jurisdiction to the clerk of the court in issuing letters testamentary or of administration, Rev., sec. 16 (3), the intent of the deceased, though he may have left his domicile for the purpose of making the change, and the physical change of residence by him, are both necessary, the one without the other being insufficient, the law being that, though he may have formed the intention to change his domicile, if there is no actual change of residence his domicile remains at his former home, the burden of proof being on the person applying to the clerk for letters to show the jurisdictional fact; but where both the elements are shown, the length of residence in the new place prior to the death of the deceased is not material.

2. **Domicile—Clerks of Court—Executors and Administrators—Judgments—Actions—Collateral Attack.**

The right of the clerk of the Superior Court to issue letters testamentary or of administration is made by our statute, Rev., sec. 16 (2), to depend upon the domicile of the deceased within the county, and being jurisdictional, the validity of letters issued by him may be collaterally attacked, by a proper party in interest or in a direct proceeding, depending upon the state of the record in each particular case and the special question involved.

3. **Same—Record.**

Where the record in proceedings to obtain letters testamentary or of administration on its face, by presumption of law or a recital of facts, shows the proper domicile, the judgment of the clerk of the court granting them may only be attacked for lack of jurisdiction in direct proceedings, recitals therein that the deceased, late of a certain county, is dead, intestate, being sufficient; but it is otherwise if the lack of jurisdiction so appears, for then the judgment may be attacked collaterally.

4. **Domicile—Clerks of Court—Executors and Administrators—Judgments—Parties in Interest—Actions.**

Where one claiming to be administrator brings an action, as such, to recover damages for the negligent killing of his intestate, the defendant is a party in interest, who may attack the validity of the proceedings wherein the administrator was appointed, upon the ground that the domicile of the intestate was not in that county, and that the clerk therefore lacked jurisdiction in the matter, Rev., sec. 16 (3), and this may be done in a direct proceeding, as was done in this case, or collaterally, as may be proper, in the particular case.

5. **Domicile—Clerks of Court—Executors and Administrators—Subsequent Appointment—Admissions.**

Where letters of administration have been granted in one county and thereafter the administrator takes out letters in another and the proper

county for the purposes of the suit, to which he has been made a party at his request, his having done so has somewhat the appearance of an admission that the prior letters were void, but this is not conclusive upon him. This is said *arguendo*.

6. Limitation of Actions—Executors and Administrators—Void Appointment—Clerks of Court—Jurisdiction—Actions—Parties.

Where one has attempted to qualify as administrator under letters issued by the clerk of the Superior Court of a county having no jurisdiction, and brings his action within the time prescribed, and thereafter has qualified in the proper county and applied to the court for permission to become a party to the pending action, to recover damages for the negligent killing of his intestate, the two years within which the action may be brought under our statute having expired at the time of his application to become a party, it is error for the court to permit him to become a party, for the former proceedings could not be maintained under a void qualification as administrator, and the course taken subsequently cannot have the effect of reviving them, as the requirement that the action for the death shall be brought within two years thereafter is a condition precedent annexed to the cause of action, and its prosecution, and not a statute of limitations.

PETITION to vacate letters of administration, heard before *Webb, J.*, in December, 1918, at Chambers.

The facts, as agreed upon, are that James Scism was, prior to 3 June, 1917, domiciled in the county of Gaston, and on that date he with his family was riding in an automobile from said county to the county of Lincoln, in which latter place he intended to make his home, having previously contracted to work for the Lloyd Cotton Mills. He had sent his household and kitchen furniture forward before he started on his journey, and it had arrived in Lincoln County. While he was proceeding from his home in Gaston County to the county of Lincoln, the automobile in which he was riding was overturned before he reached the line dividing the two counties, and he was killed in Gaston County. The case does not show that he had selected a house or place of abode in Lincoln County, where he intended to live, but only that he left his domicile in Gaston County with the intention of residing thereafter in Lincoln County.

On application of J. R. Reynolds to the clerk of the Superior Court, administration upon the estate of James Scism was granted to him, and letters accordingly issued, and he thereupon commenced an action in the Superior Court of Lincoln County to recover damages of the Lloyd Cotton Mills for alleged negligence of its servant in upsetting the automobile and killing his intestate.

The Lloyd Cotton Mills moved before the clerk to set aside the letters of administration, or withdraw them, upon the ground that they were improvidently issued, the court having no jurisdiction of the matter as

James Scism, at the time of his death, was domiciled in Gaston County, and not in Lincoln County, and that, under our statute, the clerk of the Superior Court of Gaston County had sole and exclusive jurisdiction thereof. On hearing the motion, the clerk held, upon the facts above stated, that he had no jurisdiction to issue the letters, and ordered the same to be revoked, whereupon the said J. R. Reynolds appealed, and the judge of the Superior Court reversed the decision of the clerk, and ordered the letters to be restored. The petitioner, Lloyd Cotton Mills, duly excepted to this order of the judge.

More than one year after the death of James Scism the said J. R. Reynolds applied to the clerk of the Superior Court of Gaston County for letters of administration upon the estate of James Scism, and they were granted to him, and the judge of the Superior Court of Lincoln County, on application of J. R. Reynolds, as administrator under the letters issued by the clerk of Gaston Superior Court, ordered him to be made a party to the action against the Lloyd Cotton Mills, to which the defendant Lloyd Cotton Mills excepted, and, relying upon both exceptions, it appealed to this Court.

No counsel for plaintiff.
Mangum & Woltz for defendant.

WALKER, J., after stating the facts: We are of the opinion that the judge erred in reversing the order of the clerk and holding the letters of administration, which had been issued by him, to be valid. The statute provides, under the title Jurisdiction of Clerk of Superior Court, that "he shall have jurisdiction within his county to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration in cases of intestacy, in the following cases: Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened." Revisal of 1905, sec. 16. There are other subjects of his jurisdiction enumerated, but the provision stated by us is the only one pertinent to this case.

It will be seen, therefore, that the clerk of Lincoln Superior Court had no jurisdiction or authority to grant the letters of administration unless James Scism was domiciled in Lincoln County at the time of his death. The word "domicile" has been variously defined, but its meaning may be accurately expressed, as the residence of a person at a particular place, with the intention to remain there permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave the same. Phillimore Domicile, 13; *Mitchell v. U. S.*, 21 Wallace, 353 (22 L. Ed., 584, 586); *Merrill v. Morrisett*, 76 Ala., 433,

437; *Littlefield v. Brooks,* 50 Maine, 475, 477; *Stout v. Leonard,* 37 N. J. L., 492, 495; Matter of Steer, 3 H. and N., 594; Black's L. Dict., "Domicile." In its ordinary acceptation, a person's domicile is the place where he lives or has his home. It is distinguished from "residence" or "inhabitancy," the three terms not being exactly convertible. *Horne v. Horne,* 31 N. C., 104. Domicile is of three sorts—domicile by birth or of origin, by choice, and by operation of law. The first is the common case of the place of birth, *domicilium originis;* the second is that which is voluntarily acquired by a party, *proprio motu;* the last is consequential, as that of the wife arising from marriage. Story, Conflict of Laws, sec. 46; Black's Dictionary. It is universally held, and clearly so by this Court, that in order to constitute a domicile by choice, two essential things must concur, which are "residence" and "intent" to remain at the place for an indefinite period. *Horne v. Horne, supra; Plummer v. Brandon,* 40 N. C., 190; 14 Cyc., p. 838, and note 22, where many cases are collected from nearly every State of the Union and from England and Canada.

In the *Horne case* it was held that two facts must concur to establish a domicile: first, residence, and secondly, the intention to make it a home (page 99 of 31 N. C., Anno. Ed.). We will refer to this case again more at large, as it is decisive of this one. The Court, by *Chief Justice Nash,* said in *Plummer v. Brandon, supra:* "The acquisition of a new domicil does not depend simply upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former; in other words, the change of domicil must be made manifest, *animo et facto,* by the *fact of residence* and the intention to abandon. *De Bonneval v. De Bonneval,* 6 Eng. Eq. 502, 1 Curt. 856; *Craigie v. Lewin,* 7 Eng. Eq. 460, 3 Curt. 435. *Sir Herbert Jerman Trest* in the latter case says the result of all the cases is that there must be the *animus et factum,* and that the principle is that a domicil once acquired remains until another is adopted or the first abandoned, and that the length of residence is not important, provided the *animus* be there. If a person goes from one country to another with the *intention* of remaining, that is sufficient, and whatever time he may have lived there is not enough, unless there be an intention of remaining." The presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus* of proving the change is on the party alleging it, and the onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile. It therefore is settled that before there can be a change of domicile there must be not only an intent to acquire another home but that intention must be fully executed by *actual* residence in the new

place, with the purpose of remaining there and not returning to the former domicile. The party must have gone to the new home, or, in other words, he must have reached the place in his journey thither, with present settled intention of remaining in the chosen locality for an indefinite length of time. If he fails to reach his destination, or the requisite intent is lacking, there is no new domicile and the domicile of origin is not displaced. The length of residence or the particular kind of place selected is not material, but it is absolutely essential that he should be at the chosen place for his new domicile before any change is effected. 14 Cyc., 840. It is said in Ruling Case Law, Vol. 9, p. 542, sec. 6: "To effect a change of residence or domicile, there must be an actual abandonment of the first domicil, coupled with an intention not to return to it, and there must be a new domicil acquired by *actual* residence in another place or jurisdiction, with the intention of making the last-acquired residence a home." *Residence,* combined with the intention to remain, is required to constitute domicil. *Ibid.,* p. 543, sec. 6; *King v. King,* 74 N. J. Eq., 824. And again, in the same volume, at page 553, sec. 18, it is said: "The well-established rule is that a domicile is not lost until a new one is acquired. This follows from the proposition that every one must at all times have a domicile somewhere. A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicile is not essential. But there must be a voluntary change of residence; the residence at the place chosen for the domicile must be *actual;* and to the fact of residence there must be added the *animus manendi.*" The Court, in *Mitchell v. U. S.,* 21 Wallace (88 U. S.), 350 (L. Ed., p. 588), said: "A domicile once acquired is presumed to continue until it is shown to have been changed. *Somerville v. Somerville,* 5 Ves., 787; *Harvard Coll. v. Gore,* 5 Pick., 370; Whart. Confl. Law, sec. 55. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. *Crookenden v. Fuller,* 1 Swab. & Tr., 441; *Hodgson v. DeBeauchesne,* 12 Moore, P. C., 288, 1858. To constitute the new domicile two things are indispensable: first, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. Whart. Confl. L., sec. 55, and the authorities there cited. These principles are axiomatic in the law upon the subject." And so it has been held that where a man starts on an extended journey, intending never to return to the domicile he is leaving and to establish a new domicile elsewhere, he does not lose the one left

until the new one has actually been established, and while in transit he retains the former domicile. *Barhydt v. Cross,* 156 Iowa, 271 (40 L. R. A. (N. S.), 986, and note); *Borland v. Boston,* 132 Mass., 89. In the *Borland case* it appeared that one domiciled in Boston, Mass., went to Europe in 1876 with his family for an indefinite term of absence, and remained abroad until 1879. On leaving he had determined never to return to reside in Boston, and before 1 May, 1877, he had decided to take up his residence on his return in Waterford, Conn., and on his return he went there to reside. It was held that his "domicile" was in Boston on the first of May, 1877. And in the *Barhydt case* it was held that one does not lose his domicile by starting on an extended journey with the intention of establishing the domicile elsewhere until he has actually established such domicile. To the same effect is *Plummer v. Brandon, supra.* It was held in *Fulton v. Roberts,* 113 N. C., 426, that one, before he can acquire a domicile at a particular place, must have actually resided there with the intention of making it his home. In the case of *Grimestad v. Lofgren,* 127 Am. State Rep., 566, the facts show that Grimestad was on his way with himself and family and household stuff to the State of North Dakota, for the purpose of taking up a permanent residence there, being at the time in the State of Minnesota, but before reaching the North Dakota line his personal property was levied upon. The question there was one of domicile under the exemption laws of the State of Minnesota, and the Supreme Court of Minnesota approved the following charge of the court, as will appear on page 569: "He had all the rights of a citizen of Minnesota, not having departed from the State. His family were here, and had been here, and until a party takes his family out of the State, as long as they are here, although he may start for that purpose, he is protected by the exemption laws of the State. Had they moved across the river and he had come back here with his team, it would be another thing. He was either a resident here or, according to the testimony, a resident of North Dakota. A man's residence does not cease in this State so long as it is his abiding place, and there is no evidence here that a change had taken place which would rob him of his right as a citizen of Minnesota. On that point I instruct you as a matter of law." In *Somerville v. Somerville,* 5 Vesey, Jr., 750, the Master of the Rolls, said: "The original domicile or, as it is called, the *forum originis,* or the domicile of origin, is to prevail until the party has not only acquired another but has manifested and *carried into execution* an intention of abandoning his former domicile and taking another as his sole domicile." It was held in *Lamar v. Mahony,* Dudley (Ga.), 92, that if a person intending to change his domicile has not fully effectuated his purpose, but is merely in *in itinere,* having had no actual residence in the place to which he

intends to remove, but being merely in *in itinere* or, in other words, on his way, or in the prosecution of his journey, without reaching the place where he intends to make his home, or reaching a place without such intention, there has been no change of domicile. That every man is free to change his home, and if such choice be made, followed by his presence *there,* with the intention to remain, even if it be but for a very short time, and without regard to his manner of living there, whether as a boarder merely or an independent housekeeper, a change of domicile takes place, but that in order for this to be the case it depends altogether upon the concurrence of two things: an *actual* residence in the new place and the *intention* to adopt it as his home or to remain there indefinitely. But a case of great weight, because the decision emanated from a court of the highest authority, and the opinion was delivered by a most eminent jurist, is *Otis v. Boston,* 12 Cash., 44, it is said by *Chief Justice Shaw:* "It is laid down as a fixed rule on this subject that every man must have a domicile; that he can have but one; and that, of course, a prior one will not cease until a new one is acquired. It is then asked, What is the condition of one who has purchased or hired a house, or otherwise fixed his place of abode in another place, left the town of his last abode, with all his property and furniture, and is on his way to his new abode, is he an inhabitant of the place from which he was departed? If his removal were towards another town in this State, we think his place of being an inhabitant would not be changed. He would continue to be an inhabitant of the State, and taxable in some town, and the only question would be, in which he was inhabitant on the first of May. Three might claim him: The one he has left, the one he is in, and the one to which he is proceeding. In such case we think the rule would apply, and his home would not be changed, either to the place of his actual bodily presence or of his destination, because in neither would the fact of actual presence and the intent to reside occur. Not the place where he was *in itinere,* for want of intent; nor his destination, for want of his actual residence. If he had left the State and actually passed its limits on his way to a distant State, it would certainly be a question of more difficulty in its various aspects as fixing his citizenship with a view to succession and the like." The case of *Horne v. Horne,* 31 N. C., 99, is conclusive, as an authority, against the plaintiff, and entirely decisive of the question being discussed. The case is singularly like this one. There it appeared that shortly before his death Jack Horne had left South Carolina and had come into this State, intending to make his home with William Horne, a kinsman, and there cultivate a farm with the help of William Horne, using his slaves as laborers. The evidence was not clear as to whether he had actually removed to the State, but the judge substantially told the jury

that if he had come into Anson County, with the intent to live there permanently or for an indefinite time, although by reason of his death so soon thereafter his purpose was not fully consummated, they would find that his domicile was here and not in South Carolina, his domicile of origin, but in expressing this view he used the following language: "If the deceased had come to Anson County, in this State, for the purpose of settling there permanently or for an indefinite time, his domicile would be there, *although prevented from doing so by death.*" With reference to this instruction the Court said, it being of the language quoted above: "There is some confusion in the latter clause. It is obvious, however, from the context of the whole sentence his Honor did not mean if he had been prevented by death from reaching this State, if he had died *in transitu.* In that case his domicile of origin would still have continued, for he would not have acquired a new one, and he had already told the jury that a domicile could not be lost until another was acquired. And in the same sentence he had stated to them, if the deceased had abandoned his home in South Carolina and *had come to Anson, etc.* We presume the intention of the charge in this part was to instruct the jury that the length of time during which the deceased enjoyed his new home was not material to the question of the new acquisition. In this view the charge was correct. Residence, for however long a time it may be continued, cannot constitute a domicile without the intention of permanently making it a home, nor can the shortness of time in which the new home is enjoyed defeat the acquisition when accompanied with the intention, for in the latter case there would be the *factum et animus.* These views are sustained by the cases of *De Bonneville v. De Bonneville,* 7 Eng. Eq., 502; *Craige v. Lewin, ibid.,* 560; *Plummer v. Brandon,* 40 N. C., 190, and Story Conflict of Laws, ch. 3." It will be observed that this is precisely our case, for this Court explicitly said that if while in via, or *in itinere,* he had died before reaching his destination or coming into Anson County, he was not domiciled there at the time of his death. *Horne v. Horne, supra,* has since been frequently approved, and is regarded now as the accepted law relating to domicile. It therefore governs our case.

Residence at the place in question must be shown to have existed in order that the party's domicile may be deemed to have been established there. 14 Cyc., 839, and note, citing many cases to support the text. This actual residence must be coupled with an intention to remain (*animus manendi*), as a prerequisite of domicile or, in other words, there must be the present intention of permanent or indefinite living in a given place or country, or negatively expressed, the absence of any present intention of not residing there permanently or for an indefinite time. *Price v. Price,* 156 Pa. St., 617, 626. So insistent is the law upon

residence as an essential element of domicile that the party who attempts to make a change of his domicile must actually have arrived at the new place before any such change takes place and another home is acquired. This settled rule was thus expressed in *Littlefield v. Inh. of Brooks,* 50 Me., 475: "Every one at birth receives a domicile of origin, which adheres till another is acquired; and so throughout life each successive domicile can only be lost by the acquisition of a new one." Westlake's Private International Law, 33. While *in transitu* the old one remains. It continues till a new one is acquired, *facto et animo.* The Roman law was otherwise. But such is not our law. The old domicile continues till the acquisition of the new one. Story's Conflict of Laws, sec. 48. The plaintiff has a domicile somewhere. He is to be deemed an inhabitant of some place. He was *in itinere.* He was not an inhabitant of Old Town, to which he was going, for the fact of personal presence was wanting. He was not an inhabitant of Bangor, for the intention to be one, which is an indispensable requirement, did not coexist with the fact of his personal presence. The old domicile was not lost, for the new one was not gained." That case is typical of the very many upon this subject which have been decided in this country and elsewhere, and which will be found in 14 Cyc., 833, 842, and notes. It would be useless to cite all of them by name, as they all have the same general trend and agree invariably in the principle stated. The same result, of course, follows where instead of the change of domicile being interrupted by death or other accident, the intention is abandoned, while on a journey to the new locality. The old domicile remains as it was before any change was attempted to be made. *Ringgold v. Barley,* 5 Md., 186; *Cross v. Black,* 9 Gill & J., 198; *Shaw v. Shaw,* 98 Mass., 158.

The validity of the letters of administration depends upon the domicile of James Scism being in Lincoln County at the time of his death. It is only in the absence of a domicile *in this State* that assets in the county will confer jurisdiction to grant letters. Rev., sec. 16, subsec. 3. The fact that the furniture had been sent into Lincoln County has no significance except as evidence of an intent to change the domicile. It did not confer jurisdiction, as we have seen, and surely it will not be contended that this single fact fixed the domicile in that county, for it clearly did not, neither under the general law nor under our statute.

The question is such an important one in the law of administration that we think it justifies a more extensive reference to the authorities. The uniform current of decision upon this question, as we have stated it, is well illustrated by the following statements of the doctrine which we have called from the authorities cited below. A domicile once acquired is presumed to continue until it is shown to have changed. *Mitchell v. U. S.,* 21 Wall., 350; *Somerville v. Somerville,* 5 Vesey, 787;

Harvard College v. Gore, 5 Pick., 370; Whart. Confl. Laws, sec. 35. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. *Mitchell v. U. S., supra.* To constitute a new domicile two things are indispensable: first, residence in the new location; second, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change. *Anderson v. Anderson,* 42 Vt., 352; *Gardner v. Board of Education,* 5 Dakota, 259. It is settled by many well-adjudged cases, especially by the case of *Cross v. Black, supra,* that a citizen of one State may break up his establishment and, with the avowed purpose of becoming a resident of another, may actually leave his place of former abode, yet if, before reaching the point of his intended destination, he changes his purpose, he does not thereby forfeit his residence or his rights as a citizen at the place of his first abode. The mere intention to acquire a new domicile without the fact of an actual removal avails nothing, neither does the fact of a removal without the intention. *Somerville v. Somerville, supra; Harvard College v. Gore, supra; Ringgold v. Barley,* 5 Maryland Rep., 186. In the latest case on the subject in the House of Lords, decided in May, 1868, *Lord Chancellor Cairns* said that the law is beyond all doubt clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired. *Bell v. Kennedy,* Law Rep., 3 H. L., 307. The former domicile remains until both the intent and fact of change of actual residence to another place have occurred to establish a new domicile there. *Shaw v. Shaw,* 98 Mass., 160. To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. The case of *Smith v. The People,* 44 Ill., 16, may be referred to in support of this doctrine, and other cases there cited. *Smith et al. v. Croom et al.,* 7 Fla., 200; *Shaw v. Shaw,* 98 Mass., 158. But the doctrine does not need the citation of authorities in its support. *Hayes et al. v. Hayes et al.,* 74 Ill., 312. A person *sui juris* may change his domicile as often as he pleases. There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added the *animus manendi;* and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Harrell v. Harrell,* 39 N. J.

Eq., 379. To acquire a "domicile of choice" there must concur two things: an intention to change and a taking up of an actual abode at the place selected as a new domicile; and a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence, but also the carrying out of the intention by actual residence. *Boyd's Exr. v. Commonwealth,* 149 S. W. Rep., 1022. The general rule, and for practical purposes a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this, that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove, without the intention of going back. The question here is whether he can abandon one without acquiring another, and we think it has always been held that he cannot. *Bulkley v. Inhabitants of Williamstown,* 69 Mass., 495. Those and the following cases emphasize sharply the necessity of actual presence and residence in the new location, as an essential condition or prerequisite to a change of domicile. "Undoubtedly, residence is a question of intention. In cases involving it, the inquiry is *quo animo* the party either moved to or from the State. And upon the solution of this question depends the fact whether the petitioner has gained or lost a residence. But before this question can arise an actual removal must have taken place. A mere intention to remove not consummated, can neither forfeit the party's old domicile nor enable him to acquire a new one. Removal out of the State, without an intention permanently to reside elsewhere, will not lose residence, nor will a mere intention to remove permanently, not followed by actual removal, acquire it. Case of James Casey (insolvent debtor), 1 Ashmead, 126." Fry's Election Case, 71 Pa. St., 302. "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." *Kellar v. Baird,* 52 Tenn. Rep., 39. "The civil law defines domicile to be the place where the domestic hearth has been established, from which the resident does not depart except for a temporary purpose and *animo revertendi.*" *Morgan v. Nunes,* 54 Miss., 308. "One cannot make a home in a place merely intending to do so. Whensoever the intention is conceived the home does not exist until the intention is executed by an actual concurring *bodily* presence." *Fayette v. Livermore,* 62 Me., 229. "In order to accomplish a change of residence there must be not only the intention to

change but the fact of removal. Neither is sufficient without the other. (*Ballinger v. Lantier*, 15 Kan., 608)." *Adams v. Evans*, 19 Kan., 174. See, also, note 70 to 14 Cyc., at pp. 852 and 853, and the following cases stating the same doctrine: *Ringgold v. Barley*, 5 Md., 186; *Cross v. Black*, 9 Gill & J. (Md.), 198; *State v. Frest*, 4 Harr. (Del.), 558; *Ennis v. Smith*, 14 How. (U. S.), 423 (14 L. Ed., 472); *Munro v. Munro*, 7 Cl. & F., 842; *Beecher v. Am. Council*, 114 Mich., 228; *Morris v. Gilmer*, 129 U. S., 228; *Concord v. Rumney*, 45 N. H., 423; *Merrill's Heirs v. Morrisett*, 76 Ala., 433; *S. v. Dayton*, 77 Mo., 678; *Valentine v. Valentine*, 61 N. J. Eq., 400; *De Meli v. De Meli*, 120 N. Y., 485; *Price v. Price*, 156 Penn. St., 617; *Lindsay v. Murphy*, 76 Va., 428; *Dean v. Cannon*, 37 W. Va., 123; *Kempster v. City of Milwaukee*, 97 Wisc., 343; *Sommerville v. Ld. Sommerville*, 5 Vesey Jr., 150; *Roselly v. Com.*, 110 Va., 229; *In re Est. of Titterington*, 130 Iowa, 356; Reed's Will, 48 Oregon, 500; *Parsons v. Bangor*, 61 Me., 457; *Barhydt v. Cross*, 40 L. R. A. (U. S.), 986 and note; *Channel v. Capen*, 46 Ill. App., 234.

This brings us to the next question as to the right of attacking the validity of the letters. This Court has held that it can be done if there is a want of jurisdiction, as in the case where there is a lack of the requisite domicile, under our statute, which makes the fact of domicile a jurisdictional one by explicit language to that effect. *Collins v. Turner*, N. C. Term Rep., p. 105 (4 N. C., 541, Anno. Ed.). Some cases hold that the attack upon the order or judgment of the court may be made collaterally, while others decide that it should be by a direct proceeding. This, as we will see hereafter, may depend upon the form of the record in each particular case and the special question involved. In this instance the defendant moved in both ways, collaterally and directly, so that in one or the other method he has adopted the right procedure.

In *Fann v. R. R.*, 155 N. C., 136, it was said, by *Justice Hoke*, that where the jurisdictional facts appear on the record the attack must be by a direct proceeding to set aside the letters. In *Springer v. Shavender*, 118 N. C., 33, *Justice Avery* said, in regard to a similar question: "This Court, in *Collins v. Turner*, N. C. Term Rep., 105 (541), sustained the principle upon which the decision in this case rests by holding that the grant of letters of administration on the other hand, in a county where the court had no jurisdiction of the subject-matter, was utterly void and might be attacked collaterally, thus marking the distinction between that and the case where, dealing by proper authority with the subject-matter, the court has inadvertently deprived the lawful claimant of the administration. In the early case of *French v. Frazier*, 7 J. J. Marshall (Ky.), 425, the Court, upon the principle that an

administration upon the estate of a person then alive was void for all purposes and could be impeached collaterally, *held,* as did this Court in *S. v. White,* 29 N. C., 116, that a debtor of the alleged decedent could set up the plea that the plaintiff was not administrator." The statement in the *Fann case* would seem to accord with the general principle that where the record on its face, by presumption of law or a recital of facts, shows jurisdiction, a judgment cannot be assailed collaterally, but it must be done by a direct proceeding. If, though, the want of jurisdiction appears on the record it can be collaterally attacked. *Doyle v. Brown,* 72 N. C., 393; *Rackley v. Roberts,* 147 N. C., 201; *McDonald v. Hoffman,* 153 N. C., 254. Jurisdiction is presumed where the contrary does not appear on the record. *Bernard v. Brown,* 118 N. C., 701; *Brittain v. Mull,* 99 N. C., 483; *Brickhouse v. Sutton, ibid.,* 103; *Morris v. Gentry,* 89 N. C., 248; *Henderson v. Moore,* 125 N. C., 383; *Hargrove v. Wilson,* 148 N. C., 439. "Every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there be something on the face of the proceedings to show to the contrary. This must be the rule unless we adopt the conclusion that the court is unfit for the business which by law is confided to it." *Marshall v. Fisher,* 46 N. C., 111, by *Pearson, J.,* citing *Beckwith v. Lamb,* 35 N. C., 400. This Court has held that the proper recital in a judgment makes it, *upon its face,* valid, but it is competent for a party to show the truth of the matter if the recital be false, but this must be done directly and not collaterally. *Ricaud v. Alderman,* 132 N. C., 62, at p. 64. These principles easily reconcile the *Shavender* and the *Fann cases,* even if they are apparently in conflict, which they are not if correctly understood. The application for letters in this case recites "that James Scism, *late of said county of Lincoln,* is dead, intestate, etc." We must take this to mean that he was domiciled in Lincoln County, and thus construed, it shows the proper domicile. The language used was not very apt, but is sufficient by fair construction to show domicile, at least, *prima facie.* We would "stick in the bark" if we held otherwise, by adhering strictly to the letter. It results, therefore, that the direct proceeding to recall the letters was the proper one.

But it is suggested, and was so held by the judge, that defendant has no interest in the matter concerning the validity of the appointment of plaintiff as administrator, and therefore could not move to vacate it. Why he has not we fail to see. It would appear that it is vitally interested in the question and is about the only party who is concerned. Plaintiff, as administrator, has brought this suit to recover large damages against the defendant, and the latter has the clear right to inquire if he is entitled to sue. *Collins v. Turner, supra,* held that letters of

administration granted in a county not the place of decedent's domicile are void, citing Hard., 216, and Toller, 90, where it was held: "If administration be granted by an incompetent authority, as by a Bishop, when the intestate had not *bona notabilia,* or by an Archbishop, of effects in another province, it is void." In that case and *Smith v. Munroe,* 23 N. C., 345, the fact of nonresidence was admitted. Any party interested or affected by a void judgment may attack it collaterally, in a proper case, or by a direct proceeding to have it stricken from the record as a nullity. The Court, by *Rodman, J.* (who was of most excellent learning in such matters), held in *Hervey v. Edmunds,* 68 N. C., 243, that an irregular judgment could be impeached only by some party to it, but a void judgment as, for instance, when the court lacked jurisdiction, could be attacked collaterally where the validity appeared on its face, or directly when it did not, and this could be done by *any* person interested in it or affected by it, whether a party to it or not. And it was intimated, if not held, that where the judgment is void it may be avoided or stricken from the record by the court, *ex mero motue,* or at the instance of any person not interested in having it done, and he added, "this was decided in *Winslow v. Anderson,* 20 N. C., 1, and we take it to be reasonable." To the same effect are *Dobson v. Simonton,* 86 N. C., 492; *Walton v. McKesson,* 101 N. C., 428, 442. In the *Winslow case, supra, Chief Justice Ruffin* said that any person who is affected in interest by it may claim, for the purpose of justice (*ex debito justiciae*), the exercise of the court's power to vacate a judgment which is void. So much for the right of the defendant, in the action for damages, to intervene. It would appear that the letters of administration were taken, or mainly so, for the purpose of bringing the action.

There is one question left for our consideration. The judge, on plaintiff's motion, allowed him to become a party to the action, under the new letters of administration issued by the clerk in Gaston County. Taking letters in that county, and requesting to be made a party thereunder, has somewhat the effect and force of an admission that the prior letters were void; but it is, of course, not conclusive, and we lay that feature out of the case. The judge erred in allowing the plaintiff to be admitted as party to the record, as the time for commencing the action had fully expired, if for no other valid reason. *Bennett v. R. R.,* 159 N. C., 345. This is so under *Hall v. R. R.,* 149 N. C., 108, a similar case, where we said: "Since the decision in the former appeal the plaintiff has qualified as administrator in this State, and has become a party to this action, and an amended complaint has been filed, stating the fact of his qualification and further alleging that the death of the intestate was caused by the defendant's negligence, the allegations in this respect being the same as those of the first complaint. As the plaintiff

did not qualify as administrator of the intestate in this State until after the commencement of this suit and the expiration of one year from the death of his intestate, he cannot maintain this action as such administrator. This is settled by the recent decision of the Court in *Gulledge v. R. R.,* 147 N. C., 234; approving *Best v. Kinston,* 106 N. C., 205; *Taylor v. Cranberry Co.,* 94 N. C., 526; *Roberts v. Ins. Co.,* 118 N. C., 434, and *Tayloe v. Parker,* 137 N. C., 418. See, also, *Gulledge v. R. R.,* at this term (on rehearing), where the question is discussed by *Justice Brown,* with a full citation of the authorities. The action by the plaintiff as administrator, qualified in this State, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint," citing *Hester v. Mullen,* 107 N. C., 724. The *Hall case* was approved in *Bennett v. R. R., supra,* where the Court, after quoting from the case, also said, concerning the introduction of a new party: "While courts are liberal in permitting amendments, such as are germane to a cause of action, it has frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment but to substitute a new action for the one pending," citing *Clendenin v. Turner,* 96 N. C., 416; *Merrill v. Merrill,* 92 N. C., 657; *Best v. Kinston,* 106 N. C., 205.

A careful review of the record and the several questions raised in the appeal satisfies us that there was error in the rulings of the Court. The clerk's order should have been affirmed and the action for damages dismissed, unless the plaintiff can show better reason than now appears for further prosecuting it, which would seem to be improbable.

Error.

A. W. DULA ET ALS. v. THE BOARD OF GRADED SCHOOL TRUSTEES OF LENOIR ET ALS.

(Filed 14 May, 1919.)

1. Schools—Statutes—Trustees—Discretionary Powers—Courts—Mandamus.

Where the act creating a school district for an incorporated town gives the school trustees exclusive control of the public schools therein with full power to prescribe rules and regulations relating thereto, the judgment of the trustees in the exercise of the power so conferred is upon matters within their discretion, and will not be disturbed by the courts in the absence of evidence that they have acted arbitrarily or in abuse

thereof; and *mandamus* will only lie when no discretion is vested in the trustees, to compel them to perform a specific ministerial duty imposed by law.

2. Same—Health.

In an action for a mandamus to compel the school trustees of a town to continue a term of the public schools therein to the end of a prescribed or contemplated term in May, it appeared that they had closed the school about the middle of the term, acting upon information that it was to the best interest of the health of the town to close for a while during an epidemic of influenza, and that thereafter the remaining part of the term was insufficient to permit the various grades to be benefited in qualifying themselves for the higher grades, etc. The lower court having held that the trustees acted in good faith, without abuse of the statutory powers conferred upon them, it is *held*, on appeal, that they acted within the exercise of their proper discretion, and their action will not be inquired into or disturbed by the courts.

APPEAL by plaintiffs from *Long, J.*, at the February Term, 1919, of CALDWELL.

This is an action brought by A. W. Dula and others against the Board of Trustees of the Lenoir Graded School, asking for a writ of *mandamus* to compel the said Board of Trustees of the Lenoir Graded School to open and operate the said school in Lenoir for the balance of the school term, which began in September, 1918, and was to close about 15 May, 1919.

The board of trustees employed Horace Sisk as superintendent of the graded school, Miss Mary Coffey as principal of the school, and a full corps of teachers of about twenty to run said school, to begin about the first of September, 1918, and to continue until about 15 May, 1919, and contracted to pay said superintendent and teachers a stipulated price, making a full term of school of about eight and one-half months for the year. The said graded school opened on 1 September, and continued for about a month, when an epidemic of influenza broke out in the town and school district, and about 2 October the school was suspended on account of said epidemic and continued suspended indefinitely, the said trustees hoping that the epidemic would die out and they would be justified in opening the school for the balance of the school term.

There was considerable agitation in the town, both pro and con, as to opening the school, some clamoring for it to be opened and others insisting that it ought not to be opened. About 1 January, 1919, the epidemic reached its danger point and a great number of people in the town were down with the disease and the doctors were not able to control it, and about 9 January the board of trustees met and decided that it was unwise and dangerous to the health of the town and school to open

the school for the spring term, and they decided and announced their purpose not to open the school again until September, 1919.

Soon after this meeting and decision of the trustees the influenza abated and gradually got better, until about 1 February it had almost disappeared; the trustees then consulted with Mr. Sisk, their superintendent, and Miss Coffey, the principal of the school, and were advised by them that it was inexpedient and inadvisable to open the school for the spring term at that late date, giving as their reason that the shortness of the term would not permit the pupils or scholars to make the grades and pass from their present grade at the opening of the September term, 1919, to the next grade above, and their best judgment dictated to them that it would be a waste of time and money to run the school for so short a period; thereupon the plaintiff asked for his writ of *mandamus* to compel them to open the school.

After the reading of the complaint, answer, and replication his Honor instructed the defendants to give their reasons for their action in writing, whereupon they filed the following report:

To His Honor, JUDGE B. F. LONG:

As directed by your Honor, the Board of Trustees of the Lenoir Graded School beg leave to make the following report:

1. We wish to assure your Honor that in all we have done and left undone, in the matter of directing the affairs of the Lenoir Graded School since the beginning of the term in September up to the present time we have had no feeling whatever in the matter, and have been influenced solely by what we conceived to be for the best interests of the life and health of the teachers and pupils and of the school.

2. From the early part of October until the present time the school has been closed by the quarantine put in force by the County Board of Health, which we understood had lawful authority to place such quarantine, and we were so advised by counsel.

3. As to opening the school at this time in the event of all quarantine being lifted, we are of the opinion that it would be impractical and inadvisable for the following reasons:

a. We were advised by Mr. Sisk, the superintendent, about the first of January that on account of the time already lost up to Christmas it would be possible to complete the year's work by beginning not later than 6 January, running the school six days a week, condensing the work as much as possible, and extending the term to 15 June, but in his opinion, and from his observation in other schools, this is not a practical nor satisfactory working plan and would not be advisable, the same having been abandoned by all the schools he has seen try it.

He states further that a part of the teachers, at least, in order to

comply with the regulations of the State Board of Education and to retain their certificates, must attend summer school or summer institutes, which are held in the period from 15 June to the last of August.

b. Miss Mary Coffey, principal of the High School, states to our board that teaching six days a week and extending the term to 15 June is, in her opinion, not satisfactory and not practical, and cannot be made productive of good results for the reason the teachers, as well as the pupils, must have some time to themselves, and neither can do satisfactory work without regular periods of rest. Miss Coffey is a most efficient teacher and has been connected with the school almost since the beginning in 1903.

If it was barely possible to complete the year's work by beginning 6 January, we feel that it would be altogether impossible to do so if the school was opened at any later date.

4. As we were not permitted by the quarantine to open the school on 6 January, and as on 8 January the patrons of the school in an election indicated by a vote of 150 to 70 that they wanted the school closed for the year, and the County Board of Health and our school board having agreed to abide by the wishes of the majority of the patrons, regardless of our individual opinion, we decided to close the school for the year, and felt it our duty as trustees to settle with and discharge teachers as rapidly as possible. So far we have settled with and discharged twelve out of nineteen teachers, many of whom have secured other positions, and therefore are not available for us at this time.

Our experience in employing teachers tells us that it is practically impossible to secure competent teachers at this time of the year, and that it is far better to have no teacher than an incompetent one. Six of the other teachers are engaged in teaching private schools and we understand are getting as good or better pay than their regular salaries, and this pay is to be deducted from their regular salaries from the graded school.

5. For the reasons above set forth and for the shortness of the time between now and the end of the school term, which is about 15 May, 1919, we have unanimously decided, in the exercise of our best judgment and discretion, not to open said school for the rest of the term. In doing this we feel that we are acting for the best interests of both patrons and children of said school, and we sincerely wish that the length of time between this date and the end of the term was of sufficient length to permit us to open said school and do valuable work, but we are mindful of the fact that the time is so short that whatever is done in the way of teaching between now and the end of the term would all have to be repeated, rehashed, and gone over again at the beginning of the next term, as it is impossible for the children in any grade of the

said school to complete their grade in so short a time, and they cannot, under the circumstances, even if the school were opened now, be advanced to the grade above.

Respectfully submitted,

W. B. WATSON, *Chm.*
V. H. BEACH.
V. D. GUIRE.
G. F. HARPER.
H. M. TEAGUE.
K. A. LINK.

The facts stated in this report were substantially found to be true except his Honor held that the proceedings for quarantine were irregular, and that there was no necessity for keeping the school closed after 1 February, 1919, on account of influenza, and that the defendant board then had the right to open the school. Also, that there is sufficient evidence to justify the belief that if the trustees thought proper to open the school now that they could obtain teachers to do the work, and he concluded his judgment as follows:

"But the defendants, as it seems to me, had the discretion and they exercised it, and I cannot say that they did so in bad faith or arbitrarily, so that I conclude that I cannot issue the writ of *mandamus* as prayed by the plaintiff, and the same is denied."

To this the plaintiffs excepted and appealed to the Supreme Court.

W. A. Self and Edmund Jones attorneys for plaintiffs.
M. N. Harshaw and W. C. Newland attorneys for defendants.

ALLEN, J. The graded schools of Lenoir were established under ch. 132, Priv. Laws of 1903, in which, after appointing a board of trustees, it is provided in section 13 of said act "That said board of graded school trustees shall have exclusive control of all public schools in said school district, free from supervision and control of the county board of school directors and the county superintendent of schools of Caldwell County; shall prescribe rules and regulations, not inconsistent with this act, for their own government and for the government of such schools; shall prescribe the qualifications, employ and fix the compensation of all officers and teachers of such schools; shall cause to be taken from time to time, in accordance with the general school law of the State, an accurate census of the school population of said school district, and shall exercise such other powers as may be necessary for the successful control and operation of said graded schools."

This clearly leaves the control, management, and supervision of the schools to the judgment and discretion of the trustees, and as his Honor

has refused to find that they have acted capriciously or arbitrarily the courts cannot interfere.

"In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Jeffress v. Greenville,* 154 N. C., 499; *Board of Education v. Board of Comrs.,* 150 N. C., 116; *Rosenthal v. Goldsboro, N. C.,* 149 N. C., 128; *Ward v. Comrs.,* 146 N. C., 534; *Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 392; *Broadnax v. Groom,* 64 N. C., 244." *Newton v. School Com.,* 158 N. C., 188.

The rule is otherwise, and *mandamus* will issue, when no discretion is vested in the officer to compel the performance of a specific ministerial duty imposed by law. *Withers v. Comrs.,* 163 N. C., 344.

It will also issue when officers, vested with discretion, will not act and refuse to exercise their discretion one way or the other to compel action on their part, "but the function of the writ is merely to set in motion. It will not direct how the duty shall be performed or the discretion exercised. To do so would be to substitute the judgment and discretion of the court issuing the *mandamus* for that of the court or officer to whom it was committed by law." *Battle v. Rocky Mount,* 156 N. C., 335.

In this case the trustees have acted, and as there is no finding that they have not been using their best efforts to promote the public welfare, or that they have been arbitrary, the writ of *mandamus* cannot issue.

Affirmed.

N. M. CHURCH v. VAUGHN, HEMPHILL & COMPANY ET ALS.

(Filed 14 May, 1919.)

Pleadings—Demurrer—Judgments—Injunction—Cloud on Title—Equity.

In a suit to restrain the execution under a judgment and to remove the lien thereof as a cloud upon the title to plaintiff's lands, there was allegation that the plaintiff was a purchaser of the lands, and obtained his deed therefor, at a sale made in pursuance of a judgment entered by consent of the defendant and his creditor that title in fee should be made to the purchaser under the consent judgment, and that at the time the consent judgment was entered and the subsequent taking of his deed the defendant had acquired the prior judgment under which the execution was threatened without divulging the same: *Held,* a demurrer to the complaint was bad and plaintiff's motion to continue the restraining order to the hearing was properly allowed.

APPEAL by defendants from *Cline, J.*, at September Term, 1918, of WATAUGA.

On the return of the restraining order the plaintiff moved for the continuance thereof to the hearing, and the defendants moved to vacate the restraining order and to dismiss the action. The court denied the motions of the defendants and continued the restraining order to the hearing. Appeal by defendants.

No counsel for plaintiff.
Charles G. Gilreath for defendants.

CLARK, C. J. The complaint alleges that at Spring Term of Watauga, 1918, a consent judgment was entered in the case of J. C. Cook against these defendants wherein John H. Bingham was appointed commissioner to sell a town lot in Boone, described in said judgment, and by consent he was directed to make deed in fee to the purchaser upon payment of the purchase money; that the commissioner duly advertised and sold the property. The plaintiff became the purchaser and, having paid the purchase money in full, the commissioner executed to him a deed in fee for the property. The complaint alleges further that prior to the date of said consent judgment, Hancock Bros. & Co. and the Lynchburg Shoe Co. had obtained judgments against J. C. Cook which were docketed in Watauga and were assigned to these defendants.

The complaint avers that the defendants, having consented to a judgment under which the land of Cook was sold, that title in fee should be made to the purchaser, and neither then nor at the time the plaintiff bought the land made known the fact that said defendants held said docketed judgments, which were liens on said land, are estopped to sell the land under said judgments.

The plaintiff seeks to restrain a sale of the land under said judgments as a cloud upon his title and to have them canceled. The judge finds the facts stated in the complaint to be true, there being no evidence to the contrary, and properly continued the restraining order to the hearing. The demurrer, that the complaint did not state facts sufficient to constitute a cause of action, was properly overruled.

Affirmed.

T. W. BICKETT, GOVERNOR, ET ALS. v. THE STATE TAX COMMISSION.

(Filed 21 May, 1919.)

1. Parties—Statutes—Governor—State Board of Agriculture—State Warehouse Superintendent—Cotton Warehouse Act.

The Governor, under the provisions of the Revisal, sec. 528, is the proper party plaintiff in an action for *mandamus* to compel the State Tax Commission to provide and enforce the machinery for the collection of the tax of twenty-five cents upon each bale of cotton ginned, etc., as provided by ch. 168, Laws 1919, entitled "An act to provide improved marketing facilities for cotton"; and the State Board of Agriculture and the State warehouse superintendent are also proper parties plaintiff under section 2 of the act in question, requiring that its provisions shall be administered by them.

2. Constitutional Law—Statutes—Interpretation.

The constitutionality of a statute will be presumed, all doubts should be resolved in its favor, and it will not be declared unconstitutional by our courts unless it is so proved beyond a reasonable doubt.

3. Same—Taxation—"Trades"—Cotton Ginners—Farmers—Special Tax.

Sec. 5, ch. 168, Laws 1919, entitled "An act to provide improved marketing facilities for cotton," enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be collected "through the ginner of the bale and paid into the State Treasury" to specially guarantee or indemnify the State warehouse system against loss, requiring the State Tax Commission to provide and enforce the machinery for the collection of the tax, etc.: *Held*, the act is constitutional and valid, and not in derogation of Article V, section 3 thereof, the tax contemplated being uniform upon those of the class designated, and being laid upon a trade, whether that of cotton ginning or farming, and is within the authority conferred on the Legislature to further "tax trades," etc.

4. Constitutional Law—Statutes—"Workable" Provisions—Courts.

Whether a statute is "workable" in its intended beneficial effect is for the Legislature to determine, and will not be considered by the courts in passing upon the constitutionality of the statute.

5. Constitutional Law—Taxation—State Agencies—Statutes—Mandates.

An agency of the State, required to provide the machinery for and the enforcement of a tax to be levied under the provisions of the statute, may not pass upon the constitutionality of the act and refuse to obey its mandate.

WALKER, J., concurring in result; ALLEN, J., concurring in part only.

APPEAL by defendants from *Allen, J.*, at chambers in Raleigh, 22 April, 1919.

This is an action for a mandamus instituted by the Governor of the State, the State Board of Agriculture, and the State warehouse super-

intendent, against the members of the State Tax Commission to require them to provide and enforce the machinery for the collection of the tax provided by an act of the General Assembly of 1919, entitled "An act to provide improved marketing facilities for cotton," being chapter 168, Laws 1919. At the hearing before Allen, J., at chambers in Raleigh, 22 April, 1919, the "State Farmers Union" on its own application was permitted to intervene and was made additional party plaintiff.

It is alleged in the complaint, and it is admitted by the answer, that the defendant Tax Commissioners refused and declined to execute the statute upon the ground that it was unconstitutional and invalid. This proceeding has been brought by the Governor under authority of Rev., 5328, which makes it the duty of the Governor "to supervise the official conduct of all executive and ministerial officers and to see that the duties thereof are performed, or in default thereof apply such remedy as the law allows."

From the judgment of *mandamus* to proceed to execute the statute the defendants appealed.

James H. Pou and J. Crawford Biggs for plaintiffs.

Marion Butler for the "Farmers Union," intervenors.

Attorney-General Manning and Assistant Attorney-General Nash for defendants.

CLARK, C. J. The defendants having failed and refused to execute the statute this action was properly brought by the Governor. *Russell v. Ayer,* 120 N. C., 185; Rev., 528. Section 2 of this statute provides that it shall be administered by the State Board of Agriculture through the State Warehouse Superintendent, and they have been made parties plaintiff. They are proper, if not necessary, parties. *County Board v. State Board,* 106 N. C., 81; *R. R. v. Treasurer,* 68 N. C., 502. The "Farmers Union" of North Carolina, representing a large number of the farmers of the State, largely interested in the enactment and enforcement of the statute, has been made, on its own petition, an additional party plaintiff. There has been no objection to this, and we do not see that there could be any.

It is not necessary to set out the entire act whose scope is to authorize the leasing or aid in the construction or leasing of warehouses for the storage of cotton throughout the State, and providing an indemnity fund in order to make the warehouse certificates collateral for loans in the banks or other financial agencies lending money upon such securities.

The allegation of unconstitutionality is based on section 5 of the act which is as follows: "On each bale of cotton ginned in North Carolina, in the two years ending 30 June, 1921, twenty-five (25) cents shall be

collected through the ginner of the bale and paid into the State Treasury, to be held there as a special guarantee or indemnifying fund to safeguard the State Warehouse system against any losses not otherwise covered. The State Tax Commission shall provide and enforce the machinery for the collection of this tax, which shall be held in the State Treasury to the credit of the State Warehouse system."

It is an elementary principle of law, as held by the U. S. Supreme Court, that no act can be held unconstitutional unless it is so "proved beyond all reasonable doubt." *Ogden v. Saunders,* 12 Wheaton, 213; Cooley Cons. Lim. (7 Ed.), 254. This is quoted with approval in *Sash Co. v. Parker,* 153 N. C., 134. To same purport, *Walker, J., Johnson v. Board of Education,* 166 N. C., 468; *Whitford v. Comrs.,* 159 N. C., 160; *Hoke, J.,* in *Bonitz v. School Trustees,* 154 N. C., 379. All reasonable doubts must be resolved in favor of the constitutionality of legislation. *Allen, J., In re Watson,* 157 N. C., 347. Every presumption is in favor of the constitutionality of an act of the Legislature, and all doubts must be resolved in support of the act.

The courts may resort to an implication to sustain an act, but not to destroy it. *Connor, J.,* in *Lowery v. School Trustees,* 140 N. C., 40. Statutes are presumed to be valid and every reasonable doubt must be given in favor of their validity. *Merrimon, J.,* in *Holton v. Comrs.,* 93 N. C., 434. There are many other decisions to the same effect in this Court and in the U. S. Supreme Court. Indeed, they are uniform on this point.

The Constitution, Art. V, sec. 3, provides: "Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises and incomes."

The plaintiffs concede that this is not a property tax, and rely upon it being a tax upon a trade or franchise. In *Smith v. Wilkins,* 164 N. C., 140, this Court, through *Allen, J.,* held: "The term 'trades' in Art. V, sec. 3, includes any employment or business embarked in for gain or profit," citing *S. v. Worth,* 116 N. C., 1010, wherein the Court said: "When the word 'trades' is used in defining the power to tax, the broadest signification is given to it."

In *Lacy v. Packing Co.,* 134 N. C., 571, the Court sustained an act taxing "every meat packing house doing business in the State $100 for each county in which such business is carried on." This case was affirmed on writ of error, 200 U. S., 226, and has been cited and approved in *Land Co. v. Smith,* 151 N. C., 75, in which *Hoke, J.,* says: "The power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear

to have been made upon some reasonable ground—something that bears a just and proper relation to the attempted classification and not a mere arbitrary selection," citing numerous cases.

The same subject is fully discussed by *Allen, J.,* in *Smith v. Wilkins,* 164 N. C., 140, in which he says: "In *S. v. Worth,* 116 N. C., 1010, the Court defines the term 'trades' as including any employment or business embarked in for gain or profit, and while the Constitution, Art. V, sec. 3, is mandatory upon the General Assembly to levy a tax upon all *property* by a *uniform rule,* the authority to tax trades is permissive only, and no rule as to the method is prescribed." The Constitution does not prescribe uniformity in the tax on trades, and the court decisions require only that such tax must be equal upon all persons belonging to the class upon which it is imposed. *Gatlin v. Tarboro,* 78 N. C., 122; *Lacy v. Packing Co.,* 134 N. C., 571.

In *Mercantile Co. v. Mount Olive,* 161 N. C., 125, it is said: "In *Lacy v. Packing Co.,* 134 N. C., 572, the above authorities and others were cited, the court thus summing up the law: 'It is settled that a *license tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.*'" It is pointed out that the constitutional provision requiring uniformity applies only to property, but as to license taxes, it quoted with approval the following from *S. v. Stephenson,* 109 N. C., 734 (26 Am. St., 595): "It is within the legislative power to define the different classes and to fix the license tax required of each class. All he can demand is that he shall not be taxed at a different rate from others in the same occupation, as classified by legislative enactment. This is stated as a universal rule. 1 Cooley on Taxation (3 Ed.), 260."

In Connor & Cheshire on Constitution, 271, it is said: "It is unquestionably in the discretion of the taxing power to graduate the tax according to the extent of the business so taxed, or to impose a single tax upon an occupation without regard to its extent."

"In *Winston v. Taylor,* 99 N. C., 210, under a provision of the charter of Winston, in exactly the same language as section 30 in the charter of Mount Olive, it was held that an ordinance of the town imposing a graduated tax on dealers in leaf tobacco was valid. In *S. v. Worth,* 116 N. C., 1007, it was held that a charter conferring the power to levy a license tax on 'trades' must be interpreted not only as embracing the occupation of mechanics or merchants, but all who are engaged in any employment or business for gain or profit." *Mercantile Co. v. Mount Olive,* 161 N. C., 126.

"The Legislature is sole judge of what subjects it shall select for taxation (other than a property tax which must be uniform and *ad valorem*), and the exercise of its discretion is not subject to the approval

of the judicial department of the State." *Lacy v. Packing Co.*, 134 N. C., 573; *Dalton v. Brown*, 159 N. C., 180; *Land Co. v. Smith*, 151 N. C., 75."

"The very idea of classification is inequality, so that the effect of inequality in no manner determines the matter of constitutionality." *R. R. v. Matthews*, 174 U. S., 106, quoted with approval in *Smith v. Wilkins, supra.*

The defendants rely for the unconstitutionality of section 5 chiefly upon the words therein "on" and "through," but the requirement of the payment of 25 cents "*on* each bale of cotton ginned" in this State, "to be collected *through* the ginner of the bale," is not a property tax nor an *ad valorem* tax. The expression "on each bale" is merely the method of measuring the tax upon each gin by the business done. It may be that the Legislature by the provision that "the 25 cents shall be collected through the ginner and paid into the State Treasury" contemplated that this tax, as is the case with most others, would be "passed on" to the producer or laborer. But the statute does not require that it shall be passed on. The ginner may, if he sees fit, pay the tax and advertise the fact to attract business. But it is immaterial whether the tax is upon the ginning business or upon the business of raising cotton, to be collected when it is put into a marketable shape by being ginned and baled. In either event, it is a tax upon the occupation, whether that occupation is ginning or raising cotton. The method adopted is that the ginner who puts it into condition for marketing shall pay the tax. This is a matter which rests solely in the legislative discretion. There is a very similar tax of 2 cents per bushel upon the business of dealing in oysters for market. Laws 1909, ch. 585, sec. 7; Gregory's Supp., 2419. There has been in the past also a tax upon the business of distilling liquors levied upon the number of gallons distilled. Doubtless the distiller passed that tax on in the reduced price paid for apples, peaches or grain used in his business or in the higher price for his product. Whether this was called an excise tax or revenue tax it more nearly approximated a just distribution of the burden than the retail tax upon intoxicating liquors which was levied upon each barroom irrespective of the quantity sold. Which measure should be adopted was a matter for the Legislature and not for the courts. *S. v. Powell*, 100 N. C., 525, and citations thereto in Anno. Ed. The 25 cents is less than one pound per bale.

This act recites the object in passing the statute in the first section thereof: "In order to protect the financial interests of North Carolina by stimulating the development of an adequate warehouse system for our great staple crop, cotton, in order to enable growers of cotton more successfully to withstand and remedy periods of depressed prices, in

order to provide a modern system whereby cotton may be more profitably and more scientifically marketed, and in order to give this important crop the standing to which it is justly entitled as collateral in the commercial world, a cotton warehouse system for the State of North Carolina is hereby established as hereinafter provided." This is a clear statement that the legislative purpose is to serve the public interests.

It is a matter of common knowledge that many farmers and tenant farmers are not able to raise their crops except by procuring advances upon the faith of the same, and when heretofore the crop matured these farmers were compelled to sell the crops as soon as ready for the market in order to discharge their obligations. The clear object of this statute is by aiding in the establishment of a warehouse system, and providing for an official grading of the cotton therein, and the issuance of warehouse certificates, to enable the raisers of the cotton to obtain money on such certificates to discharge their indebtedness and hold the cotton to be sold by them from time to time later on, as the condition of the market may justify. This will be a distinct benefit even to the raisers or holders of cotton who do not store it in these warehouses by removing from competition large masses of "distressed cotton" which otherwise would be thrown upon the market in November and December. The only special interest which would seem to be opposed to this matter of public policy is that class who heretofore by reason of the sales of cotton by the farmers in the early fall were enabled by their better financial condition to buy and hold it for sale in the late spring to their great pecuniary advantage, but with the loss of millions of dollars to those whose labor and land produced the cotton. It is to prevent that state of things that at the instance of the farmers, tenants, and farm laborers of the State this statute was passed.

There was a "Warehouse Receipts Act" enacted by the last General Assembly, ch. 37, Laws 1917, but it lacked (like a similar statute in S. C.) the essential feature of the tax of 25 cents per bale, which will raise probably $200,000 a year as a guarantee fund behind the warehouse certificates to guarantee such certificates and make them acceptable as collateral as it will insure the title of the cotton against litigation arising out of liens (which might be recorded in another county than where the mortgagee resides) or any other defects.

The defendants also object to the statute upon the allegation that it is not "workable," but that is a matter for the Legislature, which after full debate thought differently by enacting the statute. Section 5 provides that at least one-half of the fund raised by the 25 cents per bale—which on the 917,000 bales raised in this State last year would be nearly $230,000 cash—"shall be invested in amply secured first mortgages to aid and encourage the establishment of warehouses operating under this

system, such investments to be made by the Board of Agriculture with the approval of the Governor and Attorney-General: *Provided,* such first mortgages shall be for not more than one-half the actual value of the warehouse property covered by such mortgages and run not more than ten years."

The defendants differ with the Legislature and think that such provision will not be adequate to furnish all the warehouses necessary. If the defendants are right in this contention, that would not make the act unconstitutional, and the measure would still be valuable so far as it would reach. In fact, however, there are already in existence many warehouses throughout North Carolina which can be leased, as is evidenced by the provisions of the act based doubtless on the knowledge of the legislators, and besides, the towns in which cotton is marketed will of course compete with each other in furnishing such facilities by constructing these buildings for lease where needed in order to meet the competition of other towns in which cotton is stored for marketing.

Said section 5 provides that the money paid in (which includes the half invested in mortgages on the warehouses) shall be held in the State Treasury "as a special guarantee or indemnifying fund to safeguard the State Warehouse system against any losses not otherwise covered," and it is collected "in order to provide the financial backing which is essential to make the warehouse receipts universally acceptable as collateral, and in order to provide that a State warehouse system intended to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit."

By the census, 81 per cent of the people in this State are engaged in farming and a large part of them are interested in raising cotton. The fifty-three counties in North Carolina in which cotton is produced are vitally and directly interested in this statute. Even at 25 cents per pound the cotton crop of this State is worth $24,000,000 more than our tobacco crop at its present high prices and $12,000,000 more than our entire corn crop. For the protection of this, the greatest crop of the State, this cotton warehouse system has been established to be operated under State management. The act so declares the purpose. Even if all of the benefits should primarily go into the pockets of the growers of cotton, the resulting benefits would extend to every class of the people of the State. The system has been thought out, framed and advocated by and on behalf of the cotton farmers of the State. Its passage has been asked by the "Farmers Union" and supported by the State Agricultural Department, for the purpose of keeping within the State many millions of dollars annually, which have heretofore been drained from the State by the special interests which have profited enormously by the

forced early marketing of cotton, bought up and hoarded for sale, to the manufacturers later on.

This act intends to do for the cotton farmers in North Carolina what the "Reserve Banking" system adopted by Congress has done for the banks and other financial interests in affording a sure and reliable supply of money, thus preventing the panics heretofore prevalent.

The act, too, is so framed that it does not take any money out of the general treasury of the State to establish this system (though the State had power to do so). It does not compel any owner of cotton to store it in these warehouses, nor does it close the doors of the warehouses to those cotton growers who have some form of lien on their cotton, for the act provides that every bale of cotton can be stored, but requires that the real owner must first be determined and the warehouse receipts shall be in the name of such owner. It is true there may be some mistakes made, and for that reason the fund is provided to guarantee the holders of the warehouse certificates against loss.

The cotton grower who is in debt will be the most helped by the operation of the warehouse system, as it enables him to secure money to pay off his lien and hold his cotton for a better market which will be achieved by the gradual sale of the crop. On the other hand, the man who sells without storing will be benefited by having an unglutted market because a large part of the cotton crop will be stored in these warehouses to be sold later, and thus removed from competition.

No cotton grower appears in this case as protesting against this tax, but, on the other hand, the Farmers Union who have intervened as plaintiffs are now here representing largely the class of farmers who raised the cotton or who have liens upon their cotton, and they through their learned counsel are earnestly pleading for the validity of this act as is also the Agricultural Department of the State.

The defendants attack only section 5 of the act, and contend that there will still be enough left to make it useful and effective if that section is eliminated. It is true the act, if intended only as a "Warehouse Act," would be operative, but it would be largely useless if the fund to aid in establishing warehouses and to guarantee the certificates provided by section 5 is struck out. It is that section which makes the warehouse receipt for each bale of cotton negotiable and as good as a government bond by providing the guarantee fund. The warehouse charges will go to the owners of the warehouse, and where the State leases a warehouse this act requires that after paying the lease charges the warehouse shall be operated at cost.

The farmers of the State are our largest creators of wealth. The agricultural departments at Washington and Raleigh have been created in recent years in recognition of the fact that the farmers had received

in return small assistance from the government to whose support they so largely contributed. The cotton crop which in 1910 in this State was 600,000 bales, in one year since has been over 1,100,000. The other farm products have also increased greatly in volume and value. Yet the farmers and the State have not increased in wealth in the same ratio. The weak spot, as stated by Mr. Butler in his argument on behalf of the "Farmers Union," has been that these great staple crops have not been properly marketed, which has been due to the forced sales required to meet the obligations incurred in raising the crops.

It is passing strange that when a measure of this kind, devised and advocated by the farmers themselves in their county and State Farmers Union, and by the State Agricultural Department and by those who specially represented the farmers in the General Assembly and who have voiced their wishes and their needs by devising a system of this kind intended for their protection (the cost being defrayed by a small tax upon the products raised by the farmers themselves or upon the process of ginning and baling to make it marketable), there should be raised, not by them but by others, opposition upon the allegation that such measure is *unconstitutional!* If this measure could be struck down the damage would be sustained by the farmers and the profits would inure to those who have heretofore received large profits by reason of the farmers being forced to market their produce in competition with each other because unable to obtain money to pay off the pressing liens upon their products.

Our farmers, owing to the conditions surrounding them, have been forced to take the prices for their products fixed by foreign mill-owners who more than once have run the price down to 4½ cents at the gin-house door. This act is intended to emancipate the growers of cotton by providing a safe place to store the product at a reasonable cost with the advantage of cheap insurance and the protection of official grading. But these would be of themselves of little value without this provision of a guarantee fund for the warehouse certificate enabling the owner to hold his cotton and thus have an opportunity to fix a living price for the product of his labor and land.

If there are defects in this bill, time and experience in the operation of the act will reveal them, and it is for the Legislature then to cure such defects upon the application of those interested in the system. The act may not be perfect, but it was the best system that the friends of those intended to be benefited by the passage of the act were able to devise and get enacted. The chief difficulty to its passage—that it would call for an appropriation by the State—has been avoided by raising the funds by a tax (whether on ginning or raising cotton is immaterial) measured by each bale ginned. The owner of every bale ginned will be

benefited far more than the 25 cents raised by this tax, whether he stores in the warehouses provided in this act or without storing sells in a market without competition from the sale of "distressed cotton."

Even if it could be held that "trades" do not embrace the business of "ginning" or "raising cotton," still there is no prohibition upon the Legislature to levy taxes upon any business or other sources than trades, professions, and franchises. The Legislature of the State has all power as to taxation or otherwise which is not forbidden it by the Constitution of the State or Union. The restriction upon the taxation of tangible property is that it must be *ad valorem* and uniform. There is no such restriction upon the taxation of trades, professions and franchises and incomes, and the court has held that in fact there is uniformity in taxation as to the first three whenever it is equal upon all persons belonging to the class upon which it is imposed and that taxation can be graduated upon incomes. Nor does the recital of the power to tax "trades, professions, franchises and incomes" restrict the Legislature to those sources. We have held valid taxes upon inheritances and license taxes, and perhaps other taxes, which do not come within these words.

Much of the cotton is carried to the gins by merchants or purchasers of cotton in the seed, so the tax is on the business of ginning. But it is in the power of the Legislature in its good judgment to tax the business or occupation of cotton farming without taxing all other kinds of farming, especially when as here the benefit is intended solely for those engaged in marketing cotton. The Court has held that the Legislature has the power to divide the business of selling clothing into separate classes, *i. e.*, those dealing in new clothing and those dealing in second-hand clothing and levying a separate and different tax on each class. *Rosenbaum v. New Bern,* 118 N. C., 83; and that it could classify the users of the public roads into classes, levying a different tax on each. *Dalton v. Brown,* 159 N. C., 175; *Mercantile Co. v. Mount Olive,* 161 N. C., 124, 125.

The constitutionality of acts authorizing an *ad valorem* tax upon the goods, and at the same time a tax upon the business according to tonnage, was upheld in *Guano Co. v. Biddle,* 158 N. C., 212, as also the validity of the assessment of the cost of improvements in drainage districts. *Sanderlin v. Luken,* 152 N. C., 738; *Shelton v. White,* 163 N. C., 92. Even as to the property tax which must be levied *ad valorem* and with uniformity, the court held that this did not require uniformity in the application of the proceeds, for oftentimes the State or the county may expend a large part of its revenues in one locality and less or none at all in another locality. *Holton v. Comrs.,* 93 N. C., 430, 437.

The Supreme Court of the United States, in *Marbury v. Madison,* asserted the right of the judiciary to set aside an act of Congress or of

a State Legislature, if it deemed such act unconstitutional, which has been followed by the State courts. But the restriction has always been stated that such power could not be exercised except when the act was unconstitutional "beyond a reasonable doubt." And even with such limitation the authority of the courts to do this has been denied by Presidents Jefferson, Jackson, Lincoln, Garfield, Roosevelt and many other eminent lawyers, except in cases falling under the provision that "the Constitution of the Union and the laws made in pursuance thereof shall be supreme," U. S. Cons., Art. VI, chs. 1, 2, or in cases coming within "the judicial power of the United States," as defined in the Constitution, Art. III, sec. 2, chs. 1 and 2. In what instances the courts will exercise such power, therefore, has always been a matter of careful and considerate discussion by the court in each case. *Adhuc sub judice lis est.*

So far as we know, it has not heretofore been contended that this most important and delicate power of holding legislation invalid has been extended to any subordinate agency of the executive department.

There have been three cases in which a State official has brought a *mandamus* against another, but in none of these did the defendant refuse to act on the ground that the Legislature had passed an unconstitutional act. In *Scarborough v. Robinson,* 81 N. C., 409, it was sought by the Superintendent of Public Instruction to compel the Speakers of the two houses to sign a bill which they had inadvertently failed to do. It was held that the court had no jurisdiction to order the Speakers to sign. In *Carr v. Coke,* 116 N. C., 224, the plaintiff, acting solely as a "citizen on behalf of himself and other citizens" (though in fact he was Governor), sought to go behind the ratification of the bill, not on the ground of unconstitutionality, but upon the allegation that it had been fraudulently and erroneously enrolled without having been really enacted, and the court held that it had no jurisdiction and affirmed the dismissal of the proceeding.

In *Russell v. Ayer,* 120 N. C., 180, the Governor brought a proceeding to construe an act of the Legislature differently from the defendant State Auditor, and to require him to make out the tax blanks in a different manner from the construction placed upon the act by the Auditor. The defendant demurred upon the ground that the complaint did not state a cause of action, and this Court so held. In neither of these cases did the defendant refuse to act upon the allegation that the act of the Legislature was unconstitutional.

If the Tax Commission can hold a statute unconstitutional and refuse to execute it on that ground, any other governmental agency such as a sheriff, or a deputy sheriff, or a constable has the same power. Owing, however, to the importance of the question to the people of this State

we will pass by, without further discussion, this proposition, which if recognized would be full of possibilities and without limitation.

The Governor and the Commissioner and Board of Agriculture are endeavoring to enforce the statute, being represented by two distinguished lawyers employed specially for the occasion, and the Tax Commission is endeavoring to vitiate and set it aside, being represented by the Attorney-General. Thus the State stands to lose in any event, all the expenses and costs being borne by the State Treasury, whatever the result. No one, nor any special interest claiming to be injured by the statute, has been made a party or assumed liability for any part of the counsel fees or costs. The act of the Legislature recites that it was passed for the benefit and protection of the farmers of the State and the "Farmers Union" has been made a party on its own application, seeking to uphold the statute.

Under the present system the first street buyer who sees cotton coming into town raises his hand and claims the cotton and other buyers hold off till they in turn first see another load of cotton coming into market. The owners of the cotton have no free market for their cotton and no place to maintain a fair and adequate price as the result of the labor unless an act such as this can enable them to procure an advance of money upon cotton stored as contemplated by this act.

As was well said by Judge Biggs and by Mr. Pou in their argument, "The cotton farmers ask the State merely to furnish the machinery. They pay the entire expense. The State assumes no responsibility and risks nothing. It will be difficult to formulate a real reason why the State should deny the request made of it by a large body of its hardest working and poorest paid citizens."

When a legislative act has been duly ratified by the law-making department of the government, it is not merely *prima facie* law, but it is "the law" unless repealed by that body itself, or declared unconstitutional by some tribunal vested with judicial power to declare it unconstitutional upon the application of some party in interest who shall show beyond a reasonable doubt in the minds of such tribunal that his interest in the matter in controversy was protected by the Constitution, and has been infringed by the statute. This State has always refused to give the veto power to the Governor. The Tax Commission cannot veto or deny the validity of an act of the Legislature. They should obey it unless enjoined by the courts.

But the lack of a party averring damage to him by the act does not, as has been suggested, entitle the defendants to have this action dismissed. The plaintiffs are entitled to their *mandamus* to compel the defendants to execute the duties required of them by the statute. We have therefore considered and decided on its merits the objection to the

constitutionality of the statute so ably and interestingly argued by counsel on both sides.

Affirmed.

WALKER, J., concurs in the result, and is of the opinion that the statute in question is valid; and further, that whether the respondents can raise the question of its validity or not, this Court should, because of the great importance of the matter to the people of the State, decide whether the statute is constitutional and valid. Either ground of decision, that respondents cannot raise the question by plea or that the act is valid, would result in an affirmance of the judgment, and we may choose the ground upon which we will base our decision if it is an adequate one and supports the ruling below.

There may be defects in the act, and if so, they can be removed by legislation, after we have had experience with it in actual operation, and can then see what is needed to perfect it. They are surely not so vital as to be fatal to its validity. A statute should be sustained, if possible, by any fair and reasonable construction of its language, and not set aside as unconstitutional unless plainly and palpably so. We should indulge every presumption in its favor, and not defeat its full enforcement unless compelled to do so by a manifest conflict with the organic law.

Applying this well-settled rule, I am unable to declare that this act has not the sanction of the Constitution. I believe that strong arguments can be advanced to show that there is no such conflict, and that the act should stand as it is written. Legal minds may well differ as to the validity of the statute, but it appears to me that a liberal interpretation of its terms, which should be the one adopted in favor of its constitutionality, will disclose a scheme devised for the betterment of the public, which is in perfect harmony with the fundamental law. I forbear any further discussion of the matter, as the opinion of the Court, as written by the Chief Justice, sufficiently covers the ground.

ALLEN, J. (concurring in part only). I agree to that part of the opinion of the Court which holds that the defendant, the State Tax Commission, cannot raise the question of the constitutionality of the tax of 25 cents on each bale of cotton ginned, and I think the writ of *mandamus* ought to issue to require the performance of the only duty imposed on the Commission by the statute, which is to "provide and enforce the machinery for the collection of this tax," although there is authority for the position that an executive officer may refuse to obey a statute upon the ground of its unconstitutionality, when so advised by the Attorney-General (*S. v. Williams,* 232 Mo., 56), and I think

there can be no criticism of the Attorney-General. When asked for his opinion he could not do otherwise than exercise his best judgment, and the opinion given cannot be said to have no foundation on which to rest.

The writ, therefore, while it should issue, ought to be in the alternative and not peremptory, as no one has shown any disposition to defeat the purpose of the act, and there is every reason to believe the defendant will at once perform its duty as declared by this Court, and if it should not do so the peremptory writ would then issue.

This may appear to be technical, and as indicating too much deference to form, but it involves the principle that the Judicial Department will not interfere with either the Legislative or Executive departments when it can be avoided, and then only to the extent absolutely necessary.

The authorities, denying the right to public officers to raise the constitutional question when not injuriously affected, are collected in the notes in 6 R. C. L., 92, where the editor says: "Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights it does not affect and who has no interest in defeating it, the question has arisen whether a public officer has such interest as would entitle him to question the constitutionality of a statute and refuse to comply with its provisions; and it has generally been answered in the negative, since the interest of such officer is official and not personal, and if the rule were otherwise petty ministerial officers of the State could ignore any law which they deem to be invalid. This is especially true of subordinate officials."

It is doubtful if the exception from this rule approved by the Missouri Court in *S. v. Williams, supra,* ought to prevail in any case, but certainly not, I think, when, as appears in this record, the head of the Executive Department, the Governor, is asking that the statute be enforced, and when the defendant is required to do nothing except provide machinery for the collection of the tax, which it is lawful for it to do.

My agreement with the Court, however, on this question forces me to the conclusion that we ought not now to decide whether the tax of twenty-five cents is constitutional or unconstitutional, because "Courts will not assume to pass upon constitutional questions unless properly before them, and the constitutionality of a statute will not be considered and determined by the courts as a hypothetical question. It is only when a decision on its validity is necessary to the determination of the cause that the same will be made, and not then at the instance of a stranger, but only on the complaint of those with the requisite interest. These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance

of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of State legislation unless it is imperatively required." 6 R. C. L., 76.

"Courts never pass upon the constitutionality of statutes except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the Constitution, or some burden is imposed upon him in violation of its protective provisions." *St. George v Hardie,* 147 N. C., 97.

The authorities, in great numbers, are unanimous in support of this principle, and they proceed upon the idea that as the different departments of government are separate, and neither should interfere with the other except from necessity, that the same rule which requires the Court to resolve all doubts in favor of the constitutionality of an act, also enjoins the duty of withholding its hand without considering or passing on its validity, unless the question is directly presented by one who will be injured by its enforcement, and here the question is raised by the Tax Commission, which pays nothing, and the cotton growers, who will pay the tax, under the opinion of the Court, either directly or through the ginner, are not parties, have not been heard, are not complaining, and we are assured by counsel that they will pay without objection, if given an opportunity to do so, which they would have the right to do although the tax might be invalid.

Why, then, should we decide the question at the instance of one who is not required to pay anything when those upon whom the tax is assessed are not resisting it, and when, if invalid, they may waive any constitutional objection and pay, and the question may never arise?

No principle of taxation of more serious import nor one with greater possibilities has been before the Court, and if once established it must be followed to its legitimate and logical conclusion.

It is conceded by counsel for the plaintiffs, and this is not controverted in the opinion of the Court, that the tax cannot be sustained as one on the bale of cotton as property, because violative of Art. V, sec. 3, of the Constitution, which requires taxes on property to be uniform and at its true value, and this tax is levied without regard to the weight, grade, or value of the cotton.

Counsel are then forced to resort to the latter part of Art. V, sec. 3, of the Constitution, which says "The General Assembly may also tax grades, professions, franchises," and to contend that the tax is not on the cotton but on the trade, profession or franchise of ginning cotton, and this is the position sustained by the Court.

I cannot agree to this construction of the statute, and in my judgment it is subversive of its plain unequivocal language.

The statute says *"on each bale of cotton ginned . . . twenty-five cents shall be collected through the ginner,"* which to my mind can only mean that a tax is levied on the cotton and that the ginner is the collecting agent.

Nor am I prepared to say that the occupation of ginning cotton falls within the meaning of "trades, professions, franchises," and the language used in the statute does not justify the conclusion that the General Assembly so intended, and up to this time no one has contended that a privilege tax can be charged for producing materials for clothing and food from the soil.

It is true the tax is small and not burdensome, but if a tax of twenty-five cents a bale can be levied it can be increased to $5, and if this can be done for safeguarding a warehouse system it will be equally legal for any other public purpose, and the same rule will apply to tobacco, corn, wheat, potatoes, etc.

In other words, if a privilege tax of twenty-five cents a bale can be assessed against the grower of cotton, the same will be legal against any other producer from the soil. If it is legal for protecting a warehouse system, it is legal for other public purposes, and as the only limitation on privilege taxes is uniformity within the class, and none as to amount, the tax may be increased at the pleasure of the General Assembly.

This is a new and fruitful field of taxation, which I must decline to enter at least until those who are to pay the tax, the cotton growers, are before the courts and have an opportunity to be heard, and they are not individually parties to this record.

The General Assembly was evidently in grave doubt as to constitutionality of this tax as otherwise it would not have provided in section 19, "If any particular section of this act shall be held to be unconstitutional such holding shall not invalidate any other portion thereof."

D. A. PATTERSON ET AL. v. SALLIE E. McCORMICK ET AL.

(Filed 27 May, 1919.)

1. Estates — Contingent Limitations — Death Without Issue — Statutes — Wills—Deeds and Conveyances—Title.

A devise of lands for life, then to J. and C. equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J. and C. equally: *Held*, the common-law doctrine that a limitation contingent upon death and an indefinite failure of issue is void for remoteness, gives place to the new rule of constriction enacted by our statute, Rev., sec. 1581, made applicable since 15 January, 1828,

without restriction as to immediate estates, and a contrary intent, not expressly and plainly declared in the face of the instrument, presently construed, the death without issue refers to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survives, with issue, the absolute fee-simple title to the lands is in C. and the other ulterior remaindermen, and their deed, otherwise sufficient, is valid.

2. Same—Stare Decisis—Vested Interests—Erroneous Decisions—Rule of Property.

A vested interest in lands cannot be established under the doctrine of *stare decisis* in direct conflict with the expressions of a statutory change of the rule to the contrary, nor where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves, are upon prior executed instruments excepted by the statute, or without express reference thereto; and our statute, Rev., sec. 1581, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected by the rule laid down in *Hilliard v. Kearney*, 45 N. C., 321, and subsequent decisions on the subject.

These decisions discussed and analyzed by *Clark, C. J.; Allen, J.*, dissenting.

APPEAL by plaintiffs from *Harding, J.*, at March Term, 1918, of SCOTLAND.

This is an action to recover land. The lands in question were owned by Hugh L. Patterson, who died September, 1870, leaving a will, which reads as follows:

In the name of God, Amen. I make this my last will and testament, viz:

Item 1. I will and bequeath to my beloved mother the plantation she now resides on during her lifetime, with all the growing crop and everything connected with the place, except as hereinafter mentioned.

Item 2. I will and bequeath to my nephew John D. Jowers one sorrel horse, Charlie.

Item 2. I will and bequeath to my nephew Clem Jowers one bay colt.

Item 3. After the death of my mother I will and bequeath the plantation above mentioned to my nephews, John D. and Clem Jowers, to be divided equally between them. In case they or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson and to the surviving brother John D. or Clem Jowers, as the case may be, to be equally divided between them.

Item 4. To the heirs of my brother, Archibald Patterson, I give the original capital invested in the firm of R. Lilly & Co. at Floral College

and afterwards transferred to Shoe Heel Depot, under the title of Lilly & Patterson, and all the profits accruing therefrom.

Item 5. To the heirs of Gilbert and Margaret Patterson I bequeath the McKay Plantation together with all my landed interests at Shoe Heel Depot, money and everything else not hereinbefore mentioned. Also ten bales of cotton out of the present growing crop on the plantation bequeathed in item first of this will, and all other property not hereinbefore mentioned.

Item 6. I hereby appoint Gilbert Patterson as executor of this my last will and testament.

Item 7. It is my will that the lands which I purchased at the bankrupt sale of William Patterson, if not redeemed this ensuing fall, shall go to the heirs of my brother, Archibald Patterson; if redeemed, that the money, five hundred dollars in amount, shall go to the same. 30 August, 1870.

Nancy Patterson, the mother of the testator, who is referred to in the first item of the will, died 10 September, 1877.

John D. Jowers, referred to in items 2 and 3 of the will, a nephew of the testator, died 8 January, 1904, without leaving any issue surviving him. Clem Jowers is still living and has several children.

At the death of the testator, John D. and Clem Jowers were both minors, unmarried, and resided with testator and were supported by him. Archibald Patterson, mentioned in item 3, was a brother of the testator and died prior to the death of the testator.

Gilbert Patterson, mentioned in the third item, was a brother-in-law of the testator. Gilbert Patterson's wife, Margaret, was a sister of the testator, and she died prior to the date of the will. The defendant, Sallie E. McCormick, purchased the land for value in 1883, and the other defendants claim under her.

It is contended by the plaintiffs, as shown by the complaint, that although John Jowers died after the death of the life tenant, Nancy Patterson, the testator's mother, yet because he died without issue, the entire property is to be divided at this time between the heirs of Archibald and Gilbert Patterson and Clem Jowers; if upon the death of Clem Jowers none of his children survive him, the entire property must necessarily be divided again among the heirs of Archibald and Gilbert Patterson.

The defendants, on the other hand, contend that upon the death of the life-tenant, Nancy Patterson, the mother of the testator, the entire estate devised in the third item of the will was to be divided between John and Clem Jowers and then vested absolutely and unconditionally in them, both of them having survived the life-tenant; and inasmuch

as the defendants have acquired by purchase the title of both John D. and Clem Jowers to the lands mentioned in the first item and the third item of the will, they are the owners of said lands in fee simple.

The defendants also contend that although their construction of the will may be wrong, that this construction prevailed at the time of their purchase, and that they are protected under the doctrine of *stare decisis.* The court instructed the jury if they believed the evidence to answer the issues in favor of the defendants. The plaintiffs excepted.

There was verdict and judgment for the defendants, and the plaintiffs appealed.

Cansler & Cansler, Russell, Witherspoon & Gibson and G. B. Patterson for plaintiffs.

W. H. Neal, Cox & Dunn, McLean, Varser & McLean, McIntyre, Lawrence & Proctor and Tillett & Guthrie for defendants.

CLARK, C. J. This controversy turns almost entirely upon the construction given to these words in item 3 of the will, "In case they or either of them die without issue," and this depends upon the act of 1827, now Rev., 1581, which reads as follows: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight."

If the time of dying without issue is to be referred to the death of John D. and Clem Jowers during the existence of the life-estate of their mother, Nancy Patterson, the title of the defendants is good because John D. and Clem survived the life-tenant and neither died, *during her life,* leaving no issue, but if the time is the death of John D. and Clem, the title of the defendants is defective unless protected by the doctrine of *stare decisis* as John died leaving no issue.

At common law a limitation contingent upon death was held to be an indefinite failure of issue and was void for remoteness.

In the application of this principle and in order to avoid as far as possible defeating the intent of the grantor or testator, if there was in

any deed or will an intermediate period, such as the termination of the life-estate, a period fixed for division, arrival at full age or the like, the courts held that "dying without issue was referable to this intermediate period." This was the rule laid down in *Hilliard v. Kearney,* 45 N. C., 221, at June Term, 1853, which was based on no precedent in this State, but cited and relied solely upon English decisions. The statute of 1827 forbade its application to deeds or wills executed prior to 15 January, 1828, and the will construed in *Hilliard v. Kearney* had been executed in 1775.

The statute of 1827 changed the principle making the limitation dying without issue void for remoteness and abrogated the rule of construction which applied it to an intermediate period. This statute applied to all limitations contingent upon dying without issue, and is not restricted to those where there is no intermediate estate. The language is "Every contingent limitation," and there is no exception from its operation.

The statute also establishes a new rule of construction and fixed as the time for dying without issue "when such person shall die," and in this case John and Clem or one of them.

This rule laid down by the statute is obligatory on the courts and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." And we find no such contrary intent in the will before us.

The contention of the defendant is that while the above propositions are true and the provision of the statute is clear and unambiguous and is obligatory on the court, yet that at the time the title to the land in controversy was acquired by those under whom the defendants claim there had been a line of decisions placing a different construction upon such words in a deed and will.

Even if it were true that there had been decisions construing such limitation contrary to the plain intent of the statute, the statute must govern and not the erroneous construction of the courts. In order to make a line of decisions a rule of property they must be uniform and consistent, and not in conflict within the plain expression of the statute, for the statute law, unless in conflict with some provision of the Constitution, is supreme.

On examination we find that while there are some decisions of the tenor of *Hilliard v. Kearney,* upon examination they have not been uniform, and, on the contrary, have been almost invariably in cases where the will or deed construed came within the exception in the statute of 1827 that "this section shall not extend to any deed or will made and executed before 15 January, 1828," and a few cases in which

it does not appear at what date the instrument was recorded and others in which the court does not refer to the statute. There has not been by any means a uniform line of decisions or "consistency in error" which would have justified any reasonably prudent man in relying upon decisions in conflict with the express provisions of the statute, if that could be done in any case whatever.

On the contrary, in the following cases the court had under consideration the construction of a limitation in a will executed since 15 January, 1828, and which therefore came under the act of 1827. In each of these cases the court expressly referred to the act of 1827 and construed the limitation in accordance with the plain words of that act and not according to the rule stated in *Hilliard v. Kearney.* In one or two of these cases the limitation was precisely like that in the present case, *i. e., Clapp v. Fogleman,* 21 N. C., 467, opinion by *Daniel, J.; Tillman v. Sinclair,* 23 N. C., 183, opinion by *Ruffin, C. J.; Moore v. Barrow,* 24 N. C., 436, opinion by *Ruffin, C. J.* (in which case the limitation was exactly like that in the present case); *Garland v. Watt,* 26 N. C., 287, opinion by *Daniel, J.; Jones v. Oliver,* 38 N. C., 370, opinion by *Daniel, J.; Weeks v. Weeks,* 40 N. C., 111, at p. 115, opinion by *Battle, J.; Spruill v. Moore,* 40 N. C., 284, opinion by *Battle, J.; Holton v. McAlister,* 51 N. C., 12, opinion by *Ruffin, C. J.*

In the following cases the wills were executed before 15 January, 1828, but the Court, in delivering the opinions, advert to the act of 1827, and state that the law since the will was executed had been materially changed and that the construction of the limitation would be different under the act: *Rice v. Satterwhite,* 21 N. C., 69, opinion by *Gaston, J.; Brown v. Brown,* 25 N. C., 134, opinion by *Ruffin, C. J.; Gibson v. Gibson,* 49 N. C., 425, opinion by *Battle, J.* This last case was decided in 1857.

In every case relied upon by the defendants to support their contention the will was either made prior to the act of 1827 or the decisions were based entirely upon English decisions or decisions of this Court construing wills made before the passage of that act, or the act was not noticed and the Court appears to have been oblivious of it, temporarily of course.

Hilliard v. Kearney, 45 N. C., 221, was decided in 1853, but, as above mentioned, it construed a will which had been made in 1775, which of course was excepted from the act of 1827 by the proviso thereto, and the Court in that case cited and relied upon English cases exclusively in support of the construction given to the will in that case.

As to the other cases cited by the defendant—*Webb v. Weeks,* 48 N. C., 282, construed a will made in 1802; *Biddle v. Hoyt,* 54 N. C., 160, construed a will made in 1804, and *Fairley v. Priest,* 56 N. C., 21,

does not even refer to or discuss the question now under consideration.

Vass v. Freeman, 56 N. C., 221, construed a will the date of which does not appear in the report of the case. The opinion therein cites and relies upon *Hilliard v. Kearney, Biddle v. Hoyt,* and English decisions in support of the "intermediate period" rule therein laid down, which was moreover but a *dictum* for the reason that in that will there was neither a preceding life-estate or any provision for a division of the property at any specified time.

Jenkins v. Hall, 57 N. C., 334, construed a will the date of which is not given and relies upon *Hilliard v. Kearney,* in support of the "intermediate period" rule above referred to, though the language in that will was sufficiently definite and specific to meet the requirements of the act of 1827, if made after the statute, for fixing an intermediate period "for the vesting of the estate." *Camp v. Smith,* 68 N. C., 537, was not only decided after the probate of the will now before us, but is a *dictum.* The point was not decided at all.

Davis v. Parker, 69 N. C., 271, construed a will where there was neither a preceding life estate nor any provision for the division of the property, and what was said in support of the intermediate period rule was therefore a *dictum* only, and was stated upon the authority of *Hilliard v. Kearney.*

Burton v. Conigland, 82 N. C., 100, the first case strongly relied upon by the defendant in support of their contention in this respect, construed a will the date of which is not given in the report of the case, a clause of which provided: "I give and bequeath to my nephew, John H. Ponton, my tract of land in Quankey known as 'Longs.' . . . My friend Mungo T. Ponton is to have the use and benefit of said tract of land until he, the said John H. Ponton, *arrives at the years of twenty-one.* If he dies leaving no child, I give it to his brother William Ponton, Mariah and Mary Ponton. Should they die leaving no child, I give to Brother Henry Doggett." The Court, in holding that the effect of this clause of the will was (1) to vest the estate at once in the nephew, and (2) that the contingent limitation over in the event of the death of the nephew leaving no child must be restricted to a death occurring during the testator's lifetime or the nephew's minority, made no reference whatever to the act of 1827, and relied entirely for the decision upon *Hilliard v. Kearney* and other cases therein cited, in all which that case was cited as the basic authority for the "intermediate period" rule, and in all of which, save one, the wills construed were made prior to the act of 1827 or the dates thereof do not appear in the reported cases.

The counsel for the losing side in *Burton v. Conigland* did not in his brief rely on nor even refer to the act of 1827. In *Murchison v.*

Whitted, 87 N. C., 465, the date of the will is not stated, and the court decided solely upon the authority of *Hilliard v. Kearney* as if the will was made before 1827 or the statute was not then in the mind of the Court. The same judge (*Ashe, J.*), in the other cases written by him, recognized the change made by the statute and construed similar limitations differently.

The act of 1827 has been construed by this Court at least twenty-six times, beginning with *Tillman v. Sinclair,* 23 N. C., 183 (decided in 1840), and ending with *Kirkman v. Smith,* 175 N. C., 579, and in every case in which it has come before the Court for construction it has uniformly been held that "Dying without heirs or issue," upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. *Rice v. Satterwhite,* 21 N. C., 69, and note; *Clapp v. Fogleman,* 21 N. C., 467; *Tillman v. Sinclair,* 23 N. C., 183; *Moore v. Barrow,* 24 N. C., 436; *Brown v. Brown,* 25 N. C., 134; *Garland v. Watt,* 26 N. C., 288; *Brantley v. Whitaker,* 27 N. C., 225; *Jones v. Oliver,* 38 N. C., 370; *Weeks v. Weeks,* 40 N. C., 111; *Sanderlin v. Deford,* 47 N. C., 77; *Gibson v. Gibson,* 49 N. C., 426; *Holton v. McAlister,* 51 N. C., 12; *Miller v. Churchill,* 78 N. C., 373; *Hathaway v. Harris,* 84 N. C., 96; *King v. Utley,* 85 N. C., 60; *Smith v. Brisson,* 90 N. C., 285; *Buchanan v. Buchanan,* 99 N. C., 308; *Kornegay v. Morris,* 122 N. C., 202 (reheard 124 N. C., 424); *Sain v. Baker,* 128 N. C., 256; *Sessoms v. Sessoms,* 144 N. C., 121; *Staton v. Godard,* 148 N. C., 434; *Perrett v. Bird,* 152 N. C., 220; *Rees v. Williams,* 165 N. C., 201; *Burden v. Lipsitz,* 166 N. C., 523; *O'Neal v. Borders,* 170 N. C., 483; *Kirkman v. Smith,* 175 N. C., 579.

The earlier cases in which there were intervening life estates, notwithstanding which it was held that the limitation over did not take effect until the first taker of the fee died without leaving issue surviving him, are *Ferrand v. Jones,* 37 N. C., 633 (decided in 1843); *Spruill v. Moore,* 40 N. C., 284 (1845); *Sadler v. Wilson,* 40 N. C., 296 (1845); *Douthett v. Bodenhamer,* 57 N. C., 444 (1859). It is sufficient to quote from only one of them in which David Latham gave certain slaves *to his wife for life,* and after her death to his daughters, and provided "If either of my said daughters should die without lawful issue, then and in that case the survivor or survivors of my said daughters shall have all the said negroes and their increase forever." The life tenant was dead and two of the daughters had died without issue. *Ruffin, C. J.,* writing the opinion, said: "There is no doubt that each of the daughters took a vested interest in the slaves subject to be divested upon her death without leaving issue, and to go over as long as there was one or more

of them who could take by survivorship. Whatever doubt may have before existed, there is now none, as the act of 1827, ch. 7, enacts that such a limitation is to be interpreted as one to take effect upon the death of the party without leaving issue living at the death, unless the contrary be plainly declared in the will."

It is to be noted that in this case *Judge Pearson,* who wrote the opinion in *Hilliard v. Kearney,* concurred in the decision, the only difference between the two cases being that the will in the latter case was made before the statute of 1827.

The more recent cases where there were intervening life estates, in which this Court has held that the statute applies, are as follows: *Cowand v. Myers,* 99 N. C., 199; *Dunning v. Burden,* 114 N. C., 34; *Kornegay v. Morris,* 122 N. C., 199; *Harrell v. Hagan,* 147 N. C., 111; *Dawson v. Ennett,* 151 N. C., 544; *Perrett v. Bird,* 152 N. C., 220; *Elkins v. Seigler,* 154 N. C., 374; *Hobgood v. Hobgood,* 169 N. C., 486; *Vincent v. Wise,* 159 N. C., 653; *Whichard v. Craft,* 175 N. C., 128; *Kirkman v. Smith,* 175 N. C., 579. The case of *Vincent v. Wise* construed the will of the late *Chief Justice Smith,* in which there were two intervening life estates, notwithstanding which this Court held that:

"Under numerous decisions of the Court in a devise of this character, and unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the devisor, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till 'the event occurs by which same is to be determined, or the estate becomes absolute.'"

The language of the statute is so plain and its purpose has been so clearly stated therein and in the decisions that the sole contention of the defendants is based upon the doctrine of *stare decisis,* and which is that the law was otherwise settled by the decisions of this Court at the time the plaintiff's title accrued, and therefore that the purchaser has a vested interest in the erroneous decisions of the court, even to the extent of depriving the plaintiff of the vested interest which they have by virtue of the statute of the State.

"The court of appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis,* though one tending to consistency and uniformity of decision, is not an inflexible one." *Hertz v. Woodman,* 218 U. S., 205.

"Where the statute's meaning is plain and obvious, the Court should uphold it in its integrity, even if necessary to overrule or disregard prior decisions upon it. 15 C. J., p. 945, sec. 340, note 19a; *Remey v. R. R.,* 116 Iowa, 133.

"If it appears from the report of the case that it (the point) was not

taken or inquired into at all, there is no ground for presuming that it was duly considered, and the authority of the case is proportionately weakened." 15 Corpus Juris, p. 942 (sec. 333); *Maloney v. Dows,* 54 Barlow (N. Y.), 32; *In re Lyman,* 161 N. C., 119, and 160 N. Y., 96. *"The rule does not preclude overruling decisions upon subjects plainly erroneous."* 15 Corpus Juris, 944, 945; 15 C. J., p. 945 (sec. 340) 1; *Mason v. McCormick,* 80 N. C., 244. The rule of *stare decisis* cannot be applied to perpetuate error. Sec. 357, 15 C. J., p. 956.

There are several insuperable objections to the contention of the defendant.

1. The doctrine of *stare decisis* cannot be construed as giving a vested right when there are conflicting decisions. It can only be sustained when the decisions are uniform and consistent. "When there are conflicting decisions there can be no application of the doctrine of *stare decisis.*" 15 C. J., p. 955, sec. 355, notes 8 and 9.

2. "Where the statute is explicit and has been overlooked, the doctrine of *stare decisis* does not apply." 15 C. J., 958, note (h), col. 3, near bottom, citing *Remey v. R. R.,* 116 Iowa, 133; *Law v. Smith,* 34 Utah, 394; *Tel. Co. v. R. R.,* 95 Va., 661. When the statute and the precedents conflict the statute controls. The courts cannot by a line of erroneous decisions overrule the statute.

3. To this last rule there has been only one exception claimed which is that when there have been uniform decisions giving a statute a certain construction and a contract has been made which would be valid under such construction, the later decision does not retroact so as to invalidate such contract. *Hoke, J.,* in *Mason v. Cotton Co.,* 148 N. C., 509; citing *Falconer v. Simmons,* 51 W. Va. 172, 26 A. & E., 184. But a conclusive reply to this is that this exception to the principle has no application in this case *for the reason that this Court has never in any case construed the act of 1827 to mean other than that the death of the first taker of the fee, without heirs or issue, meant dying without living issue at the time of his death.*

This is conclusive of this controversy. There has been no uniform line of decisions under which the defendants could claim, as creating *stare decisis* contrary to the statute if this could be done. The decisions which the defendants cite are those construing wills or deeds executed prior to the enactment of the statute or in cases where the statute was ignored. There have been no decisions construing the statute contrary to the line of decisions which is now the settled law and under which the plaintiffs are entitled to recover.

We are of opinion that upon the death of John D. Jowers the title of the plantation in question vested absolutely in the plaintiffs as the children of Archibald and Gilbert Patterson and the defendants, the

purchasers from Clem Jowers, and it appearing from the record that the defendants, in their answer, admitted an eviction by absolutely denying plaintiffs' title or interest in said plantation, his Honor erred in charging the jury as set out in the record.

Error.

ALLEN, J. (dissenting). The determination of the controversy between the plaintiffs and defendants requires the consideration of the act of 1827, now Rev., sec. 1581, which is as follows: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children or offspring or descendant or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight."

If the time of dying without issue is to be referred to the death of John D. and Clem Jowers during the existence of the life estate of the mother, Nancy Patterson, the title of the defendants is good, because John D. and Clem survived the life tenant, and neither died *during her life* leaving no issue, but if the time is as of the death of John D. and Clem, the title of the defendants is defective unless protected by the doctrine *stare decisis,* as John died leaving no issue.

The decisions dealing with the statute and with the rule prevailing prior to its enactment, running from *Bryant v. Deberry,* 3 N. C., 356, to *Kirkman v. Smith,* 175 N. C., 579, and including at least seventy-five cases, are collected and discussed in the learned and discriminating briefs of plaintiffs and defendants. I have devoted much time to their consideration, with the result that they are found to be in such conflict that they cannot be reconciled, and I have concluded that it is the better course to announce the principles that I believe to be controlling rather than attempt a classification and reconcilement of authority, which I do as follows:

1. At common law a limitation contingent upon death without issue was held to be an indefinite failure of issue and was void for remoteness.

2. In the application of the principle, and in order to avoid as far as possible defeating the intent of the grantor or testator, if there was in the deed or will an intermediate period such as the termination of a life

estate, a period fixed for division, arrival at full age and the like, the courts held that "dying without issue" was referable to this intermediate period. This is the rule of construction announced in *Hilliard v. Kearney,* 45 N. C., 221, and it has been followed many times since the act of 1827, although not always with the construction of the statute under consideration.

3. The statute of 1827 changed the principle making the limitation void for remoteness, and abrogated the rule of construction referring the "dying without issue" to an intermediate period. I have reached this conclusion, being conscious that it is at variance with what has been said in several recent decisions of this Court, but it is in harmony with *Harrell v. Hagan,* 147 N. C., 111; *Kirkman v. Smith,* and other cases.

4. The statute applies to all limitations contingent upon dying without issue, and is not restricted to those where there is no intermediate estate. The language is "Every contingent limitation," and there is no exception from its operation.

5. It also establishes a new rule of construction, and fixes as the time for dying without issue "when such person shall die," in this case John and Clem or one of them.

6. This rule is obligatory on the courts and must be observed, unless a contrary intent is "expressly and plainly declared in the face of the deed or will," and we find no such contrary intent in the will before us.

7. Applying these principles, the plaintiffs would be entitled to recover, but for the doctrine that the laws in force at the time of making a contract, as interpreted by the highest courts, enter into and become a part of the contract, and property rights acquired thereunder cannot be divested by a subsequent change of decision, a doctrine peculiarly applicable to real estate titles.

At the time title to the land in controversy was acquired by those under whom the defendants claim the latest decisions of the Court dealing with a limitation contingent upon death without issue were *Burton v. Conigland,* 82 N. C., 99, and *Murchison v. Whitted,* 87 N. C., 465, and in both the doctrine of *Hilliard v. Kearney* was applied, and under them the title of the defendants would be good, because John and Clem Jowers survived the life tenant, and neither died leaving no issue during her life.

The case of *Hathaway v. Davis,* 84 N. C., 96, relied on by the plaintiffs, does not weaken the authority of these decisions because in that case the person upon whose death the contingent limitation depended left issue.

If it can be supposed, as the plaintiffs contend, that the learned judges who concurred in these decisions—*Smith, Ashe, Dillard* in the first, and *Smith, Ashe, Ruffin* in the second—were inadvertent to the

act of 1827, an important statute affecting the title to land, which had been in force more than fifty years when *Burton v. Conigland* was decided, and which had been frequently referred to in the reported cases, it would seem to be unreasonable and unjust to demand greater diligence and more perfect knowledge of the defendants and to require them to keep the statute in mind while relying on the solemn adjudications of the Court.

As said by *Walker, J.*, in *Hill v. R. R.*, 143 N. C., 581, "The people are supposed to have confidence in their highest court, at least to the extent of ascribing to it the virtue of consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights, because he has simply acted upon the supposition that what the Court has so solemnly determined will again be its decision upon the same state of facts, or that at least, if it does change its mind, his rights and interests will be thoroughly safeguarded. If courts proceeded upon any different theory in the decision of causes, the people would be left in a state of uncertainty as to what the law is, and could not adjust their business affairs to any fixed and settled principles which would, of course, produce most mischievous, if not disastrous, consequences."

Again, *Brown, J.*, says in *Hill v. Brown*, 144 N. C., 119, "We deduce the well-settled principle from a number of authorities that the law of contract enters into the contract itself and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it and as it is construed at the time the contract is made. *Napier v. Jones*, 47 Ala., 96; *Davis v. Montgomery*, 51 Ala., 146; *Herndon v. Neave*, 18 S. C., 354; *Haskett v. Maxey*, 139 Ind., 66; 19 L. R. A., 379. The annotator says, in commenting on the last cited case: 'The effect of judicial decisions as the law of a contract made while the decisions are in force, although they are overruled before the time for enforcing the contract, is recognized in the above decision. The justice of this doctrine is apparent.'"

In the last case (*Hill v. Brown*) a title to land acquired in 1903 was sustained, because valid under a decision of the Supreme Court rendered in 1902, although overruled in 1904, and it has been approved in *Mason v. Cotton Co.*, 148 N. C., 511, and *Jones v. Williams*, 155 N. C., 190, the Court saying in the last case, "Parties have the right to act upon the decisions of this Court in acquiring titles, and such titles will not be disturbed or the parties prejudiced by a subsequent reversal of the decision. We have so held in two recent cases—*Hill v. R. R.*, 143 N. C., 539; *Hill v. Brown*, 144 N. C., 117. Such a rule is based upon an ancient maxim of the law, is a just one, and should be perpetuated."

The same doctrine was approved at the last term in *Fowle v. Ham*,

176 N. C., 12, and a title to land protected which was acquired under the law as laid down in a single decision, although it had been overruled.

The defendants, who are purchasers for value, bought when the two latest decisions of this Court bearing on the question, by unanimous opinion, declared their title to be good, and I think they ought to be protected as against the plaintiffs, who are volunteers.

FRANK WALDO ET AL. v. W. L. WILSON.

(Filed 27 May, 1919.)

1. **Costs—Transcript—Motions—Judgments—Jurisdiction.**

The costs of preparing and transmitting the record on appeal to the Supreme Court are costs of the Superior Court, and therein motions, orders or judgments affecting or taxing them should be made.

2. **Same—Copying Transcript—Printing Record—Unnecessary Matter.**

Where it was formerly adjudged in the Supreme Court that the appellant had put into the printed record immaterial and irrelevant matter, which was not set up at the appellee's instance, and not taxable against the latter in taxing the costs of the appeal against him, and there is a later appeal from an order of the Superior Court taxing the defendant for the copying of such immaterial and irrelevant matter appearing in the transcript of the case sent up: *Held*, Rule 22, of the Supreme Court applies to the copying as well as printing the unnecessary matter, and the order appealed from will be reversed.

3. **Same—Appeal and Error—Prosecution Bond—Duty of Courts—Statutes—Rules of Court.**

The taxing of costs of an action is a creature of statute in contemplation of which each party pays his own costs as the cause proceeds, the prosecution bond being for the security of such costs as the defendant may have wrongfully been compelled to pay, and it is the duty of the Court to prevent imposition therein. Therefore an appeal will lie from an order taxing costs of an action made by the Superior Court judge. Supreme Court Rules 19, 21, 22, 31.

APPEAL by defendant from *Ferguson, J.*, at September Term, 1918, of GRAHAM.

This is an appeal from an order taxing the defendant with the entire cost of copying the transcript on the plaintiffs' appeal to the Supreme Court, 173 N. C., 690; *S. c.*, 174 N. C., 767.

James H. Merrimon for plaintiffs.
Martin, Rollins & Wright for defendant.

CLARK, C. J. There was a motion in this cause, *Waldo v. Wilson,* 174 N. C., 767, to retax the costs by allowing the plaintiffs to recover the entire costs of printing the record (238 pages) notwithstanding the general rule confined the allowance of costs for printing to sixty pages of printed matter. Rule 31, 174 N. C., 836. This was denied upon the ground as therein stated, that "A large part of the record as printed related to a matter upon which the appellant failed to establish his contentions, although he secured a new trial."

In the Superior Court, when the case went back, the plaintiffs filed a motion and obtained an order to tax against the defendant the entire cost of copying the transcript on appeal to the Supreme Court which consisted of 238 printed pages, although this Court had adjudged that much of this matter was immaterial, and adjudged that the defendant was not liable for the cost of printing the transcript in excess of 60 pages. Rule 22 of this Court, 174 N. C., 833, prescribes "The cost of copying and printing unnecessary and irrelevant testimony or other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the costs shall be taxed against him."

This rule applies to "copying" as well as "printing" the unnecessary matter, and that "in all cases it shall be charged to the appellant unless it appears that the unnecessary matter was sent up at the instance of the appellee."

This Court having adjudged in this case that the unnecessary matter was sent up at the instance of the appellant in the former appeal, the plaintiffs, they were not allowed to recover the costs of printing the unnecessary matter. If it was unnecessary to print, it was unnecessary to have it copied in the record. The plaintiffs are entitled to recover the costs for copying so much of the transcript of the record as they were permitted to recover for the printing thereof and no more.

The order was appealable. It is said in *Van Dyke v. Ins. Co.,* 174 N. C., 81, quoting from *S. v. Horne,* 119 N. C., 853: "While this Court will not entertain an appeal on the merits to determine who shall pay the costs of an action in which the subject-matter has been disposed of, yet where the question is whether a particular item is properly chargeable as costs, or, taking the case below as rightly decided, whether the costs are properly adjudged, the case is reviewable on appeal."

It is true that the costs of preparing and transmitting the record on appeal to the Supreme Court are not costs of this Court but of the court below, and that orders and judgments for the payment thereof should be made in the lower court. *Roberts v. Lewald,* 108 N. C., 405; *Dobson v. R. R.,* 133 N. C., 624. Still the order in the Superior Court is appealable. *Van Dyke v. Ins. Co., supra.*

At common law neither party to a civil action recovered costs and each side paid its own witnesses, *Costin v. Baxter*, 29 N. C., 111; and in criminal actions the sovereign neither paid or recovered costs. Costs are entirely creatures of legislation, and an appeal lies from a judgment involving merely the taxation of a bill of costs. *Blount v. Simmons*, 120 N. C., 23; *Guilford v. Comrs., ibid.*, 28; *Luther v. R. R.*, 154 N. C., 104.

It is in contemplation of law that each party should pay its own costs as the action proceeds subject to the right of recovery of costs in the final judgment. *Smith v. R. R.*, 148 N. C., 335.

The object of the prosecution bond is not to secure the officers against the plaintiff for their costs but to secure the defendant in the recovery of costs wrongfully paid out by him. It is the duty of the courts to prevent the imposition by either party of unnecessary costs upon the other. It is for this reason that Rule 22 prohibits the costs of copying and printing unnecessary and irrelevant testimony to be taxed against the appellee in any case, unless the appellee was responsible for inserting the unnecessary matter in the record. It is for this reason also that Rule 19 designates what matter is unnecessary to be sent up, and that Rule 21 prescribes that the evidence on appeal shall be set out in narrative form. The order below is

Reversed.

IN RE T. J. PARKER.

(Filed 21 May, 1919.)

1. Appeal and Error—Contempt—Courts—Statutes.

A wilful disobedience of the process or order of the Superior Court to desist from the doing of an act obstructing the lawful working of a public road, is not a contempt committed within the immediate presence or verge of the court, and an appeal will lie to this Court from the judgment of contempt. Rev., secs. 939, 940.

2. Same—Findings—Evidence.

The facts found by the judge of the Superior Court in adjudging a party guilty of a contempt for disobedience of its order committed not in the immediate presence or within the verge of the court are conclusive on appeal, when supported by legal evidence, which in this case is held to be more than sufficient.

3. Contempt—Process—Order—Disobedience—Intent—Statutes.

The wilful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt of court, under our statute, from which he may not purge himself by disavowing a disrespectful intent. Rev., secs. 939, 940.

IN RE T. J. PARKER.

MOTION for rule upon respondent to show cause why he should not be attacked for contempt because of disobedience, and the obstruction of an order of the court, issued by Judge Bond in another case, heard before *Bond, J.*, at December Term, 1918, of GATES.

The judge, upon the affidavits, found the following facts:

1. On 23 August, 1918, a restraining order in a cause pending, to which the respondent T. J. Parker was party defendant, was issued, a copy of said order is hereto attached. Mr. Parker was present when the order was made by the court, and was fully aware of its contents; that since then the court finds the facts from the evidence to be that the said Parker has wilfully disobeyed the terms, commands and spirit of the order which was lawfully issued by the Superior Court.

2. It further finds that he has offered wilful resistance to the lawful order and process of said court, in that by threats and display of weapons and in other ways he has attempted to defeat the carrying out of the terms of said order, with the terms of which he was entirely familiar.

3. The court finds as a fact that the acts complained of in the affidavit filed as a basis for this proceeding on the part of said Parker were intended to and did defeat, impair and prejudice the rights and remedies of the parties to said action, and prevented the parties named in said restraining order from using the authority and right to make changes in said fence and ditch in accordance with the language of the said order.

4. The court finds from the evidence in the cause that the conduct of the said Parker has been an intentional defiance of the lawful order of this court, and that he has attempted by threats of violence and display of weapons, and by threats as to what he would do, to defy and defeat the lawful and proper order of this court.

5. The rule to show cause why T. J. Parker should not be attached for contempt was issued on 10 December, 1918, and a copy was served on him on the same day. He was ordered to appear before the court on 11 December, 1918, at the courthouse of Gates County, and was furnished with a copy of the original affidavit, and was given such time as his counsel requested, until the latter could return from a trip to Warren County, to have the hearing. At the hearing he appeared in person and by counsel and filed affidavits in the case.

6. The court requested Solicitor Ehringhaus to appear in the matter for the purpose of protecting the order of the court, and designated him as the party upon whom any papers may be served at the request of Parker.

Upon the foregoing finding of facts it is adjudged, ordered and decreed by the court that the respondent Parker is guilty of contempt of this

court, and that he be imprisoned in the common jail of Gates County for a period of fifteen days, and in addition thereto that he pay a fine of one hundred dollars and the costs of this proceeding, to be taxed by the clerk.

As will appear by reference to finding No. 3, the judge also found the following additional facts, having held that the statements in plaintiff's affidavit, which he made the basis of the ruling, are true.

The highway commission hired Thomas Vaughan to go and move the fence. Vaughan went to move the fence, and from a sense of courtesy he went to the house of the defendant Parker and told him he had come for that purpose. The defendant Parker told said Vaughan that he had several sizes of shot for the man who attempted to move the fence, and he intended to shoot the first man who attempted to move that fence; that Bond (meaning Judge Bond) had ordered it moved, and if he wanted it moved let him come and move it himself; that said Vaughan, not wishing to be killed or injured, left the job and returned to Chairman Hale the material which had been given him to enable him to do the work. The said highway commission then went to W. J. Doughtie, known friend to defendant Parker, he having made an affidavit in his interest in the hearing at Edenton, for the purpose of employing him to do the work, having heard that defendant Parker had said he was willing for Mr. Doughtie to move it. Doughtie refused to have anything to do with moving the fence. He stated to Chairman Hale that he had heard defendant Parker say that he would shoot any man who went there for the purpose of moving that fence. Chairman Hale asked Doughtie if he understood Parker to be in earnest or just jesting, to which Doughtie replied that he took him at his word and did not want to undertake the job. The highway commission then reported all these facts to their attorney and asked to be advised. They were counseled to notify the sheriff of the county, J. W. Brown, to meet the commission at the place where the work was to be done on a fixed day and hour. To have six other good citizens of the county present. For the whole commission, every member, to go with the laborers on that day to move the fence or take the consequences. They went there on another occasion, when the sheriff was the first one to arrive. He found defendant Parker at the place where the work was to be done with a two-barrel shotgun, an axe and a grubbing hoe. The sheriff tried to reason with defendant Parker and persuade him to leave. He refused, and told the sheriff that he intended to shoot any man who came to do the work of moving that fence; the sheriff drove on up the road to Eures Station and met the commissioners and others, and reported what he had seen and heard. The sheriff, desirous of preventing bloodshed, suggested to the commissioners that he would precede them

and decoy defendant Parker, if he could, into his automobile, and take him away till the work could be done. The sheriff executed this plan, and defendant Parker took his shotgun and put it in the sheriff's car, and the sheriff took him a considerable distance before returning; the commissioners in the meantime, with their force, went there and moved the fence. On the night preceding the arranged day for moving the fence the defendant Parker went to the home of Commissioner Sparkman and called him out of his house, stated to him that he was informed that it was the purpose of the commissioners to move the fence the next day, and was told by Sparkman that that was true. Defendant Parker then stated to Commissioner Sparkman that if he intended to go there and move the fence the next day he had better kiss his wife and babies good-bye, for he was going to kill any man who went there to move that fence. Commissioner Sparkman told defendant Parker that he was going; that he had a message directing him to go, to which defendant Parker replied, "Well, you had better not go. I will shoot any man who puts his hands on that fence to move it, and before it is moved you will have to walk over my dead body." The highway commissioners have repeatedly tried to employ some one to cut out the ditch along the part of the road where the fence was moved, but everybody refuses, and stated that they were afraid of defendant Parker, and that they did not want any trouble with him.

The judge then adjudged the respondent to be in contempt, fined him $100, and ordered him to be imprisoned for fifteen days in the common jail of the county.

Respondent excepted and appealed.

R. C. Bridger for respondent.

J. C. B. Ehringhaus, A. P. Godwin.

Attorney-General Manning and Assistant Attorney-General Nash, contra.

WALKER, J., after stating the case: The statute provides, among other things, that any person found guilty of wilful disobedience of any process or order lawfully issued by any court, or of resistance, wilfully offered, to the lawful order or process of any court, shall be adjudged as having committed a contempt of the court, and fined not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or both, in the discretion of the court. Rev., secs. 939 and 940. This is not a contempt committed within the immediate presence or verge of the court, and an appeal, therefore, lies from the judgment below. *Ex parte McCown,* 139 N. C., 95; *In re Deaton,* 105 N. C., 59; *Cromartie v. Comrs.,* 85 N. C., 211; *In re Daves,* 81 N. C., 74; *Ex parte Robins,* 63

N. C., 309. The findings of fact by the judge are conclusive upon us when there is evidence to support them, which is the case here. *Ex parte McCown, supra; Young v. Rollins,* 80 N. C., 125, and are reviewable only for the single purpose of passing upon the sufficiency of the facts, when there is competent evidence of their existence, to warrant the judgment. *Green v. Green,* 130 N. C., 578. It has been held, though, that when the facts are found by an inferior court they may be reviewed by the Superior Court. *In re Deaton, supra; S. v. Aiken,* 113 N. C., 653. When the Superior Court finds the facts in a *habeas corpus* proceeding, the revising tribunal, which is this Court, may adjudge whether they make out a case of contempt. *Ex parte Summers,* 27 N. C., 149; *Ex parte McCown, supra.*

The court below was well within the provision of the statute as to punishment, as it imposed only one-half of the maximum allowed. Rev., sec. 940. We agree with the court, though, as to the facts, being of the opinion that the evidence fully justifies its findings, and that it heard only competent proof of them. So that it brings us to this question, whether the findings show a case of contempt, for which the respondent could be punished. We have no doubt of the correctness of the decision upon this question. The court had issued a restraining order, in an action to which respondent was a party, forbidding him to interfere with the officers and agents of the law in laying out a public road, and especially by preventing them from removing his fence, which obstructed the way. This was a plain and direct order, which could be easily understood and obeyed, and yet the respondent, after he had full knowledge of its terms, deliberately, openly and defiantly refused to observe it, or to comply with its mandate, but on the contrary, by a display of his gun, accompanied by a bloody threat to take the life of any man who dared to remove the fence, he intimidated the officers and prevented them from executing the order of the court. His conduct was not only illegal but very reprehensible and contemptuous. If it was not a contempt, within the meaning of every definition of that term, we can hardly comprehend what combination of facts would present a case within the provisions of the statute. It was as plain a contempt as could be imagined or conceived.

This was not a case where the respondent could purge himself by disavowing that he intended to be disrespectful to the court, as the intention or motive was not involved, but, on the contrary, he is tried upon the fact of disobedience, which is of itself a contempt from the very nature of the act. He will not be heard to say that he did not intend to be contemptuous when he wilfully and obstinantly obstructed the coercive process of the court, and especially when he repeated the act and persisted in his resistance to the order. The court, too, finds

that he did intend to do what was done with the purpose of setting at defiance the order of the court, which was that he refrain from doing the very act. An apparent recalcitrant may purge himself of the charge that he has committed a contempt when the gravamen of the alleged offense rests upon intention or motive, but not when the intent is not involved and the contempt consists in doing the act. Respondent was allowed to purge himself of the contempt in *Hannan v. Grizzard,* 89 N. C., 115 (failure to induct an elected officer, believing him to be ineligible); *In re Walker,* 82 N. C., 96 (where he was allowed to excuse himself by showing that he did not have possession or control of a child he had been ordered to produce in court in a *habeas corpus* proceeding for the surrender of the child to its proper custody. *Justice Dillard,* with his usual clearness, draws the line of demarcation there between cases where intention or motive is involved and when it is not); *In re Moore,* 63 N. C., 397 (attorney's disbarment cases, where intent was the gravamen). Other notable cases are *Ex parte Biggs,* 64 N. C., 217; *In re Robinson,* 117 N. C., 533; *Kron v. Smith,* 96 N. C., 386; *Boyett v. Vaughan,* 89 N. C., 27; *In re Gorham,* 129 N. C., 481; *In re Young,* 137 N. C., 552; *Baker v. Gordon,* 86 N. C., 120; *Herring v. Pugh,* 126 N. C., 852. The party must, of course, possess the ability to comply with the order, and a lack of it excuses, as in the case of *In re Walker, supra.* But the motive to act in contempt of the court was manifest in this case, and was also found by the court to exist, so that tested by any rule the respondent was properly held to be guilty of contempt under the statute. It is not required that we decide whether he would be guilty at common law, because the power to punish in such a case is inherent in the court, as essential to its very existence and in order to preserve its dignity and power to enforce its orders and judgments. *Ex parte McCown, supra; Ex parte Schenk,* 65 N. C., 366; *In re Patterson,* 99 N. C., 418; *In re Oldham,* 89 N. C., 26; *In re Robinson,* 117 N. C., 533. We see, therefore, that Walker's case, relied on by appellant, has no application, as it does not decide what is supposed by him to be its legal effect. Nor does *Huet v. Lumber Co.,* 138 N. C., at p. 445, hit any nearer the mark. There the injunction was ineffectual because the act to be restrained was not only threatened but had been accomplished, as in the New Bern case of felling the tree (*Harrison v. Bryan and City of New Bern,* 148 N. C., 315), and there was no practical way of preventing an apprehended or threatened wrong, or of protecting the right by an injunction. *Pickler v. Board of Education,* 149 N. C., 221; *Huet v. Lumber Co.,* 138 N. C., at 445; *Wallace v. Wilkesboro,* 151 N. C., 614; *Moore v. Monument Co.,* 166 N. C., 211; *Little v. Lenoir,* 151 N. C., 417.

We may well close with a reference to what was held in several recent

cases covering fully the points herein raised. A party and his agents who wilfully violate a temporary restraining order enjoining the party and his agents from doing a specified act pending litigation are guilty of contempt of court. *In re Caro. C. and O. Rwy. Co.,* 151 N. C., 467. The motive of a party who directly and plainly violates a temporary restraining order is immaterial on the question whether he was in contempt for violating it. *Weston v. Lumber Co.,* 158 N. C., 270; and in such cases when guilt does not depend upon the motive, the violator cannot purge himself of the contempt by claiming that he did not intend to disregard the order or to be disrespectful to the court, as the baneful result flows logically and necessarily from his acts, *Mocksville Lodge, No. 134 v. Gibbs,* 159 N. C., 66, and advice of counsel will not relieve him in law from liability for the penalty, but may be material on the question of punishment. *Weston v. Lumber Co., supra.* In this case, and those just cited, the act which necessarily obstructed the execution of the court's order was intentionally, and even wilfully, committed. Facts less strong than those found in this case were held sufficient to show that the restraining order of the court was knowingly and intentionally violated in *Davis v. Champion Fibre Co.,* 150 N. C., 84, and *Mocksville Lodge, etc. v. Gibbs, supra,* and in the case last cited it was also held that the finding by the court of the facts is not reviewable here, when the respondent was adjudged guilty of violating a restraining order, if supported by evidence. This is the general rule. See *Mormand v. Carlisle,* 131 Ga., 493.

It follows that there was no error in the proceedings and judgment of the lower court

Affirmed.

WALTER J. NORWOOD AND WIFE v. RALPH H. CROWDER ET ALS.

(Filed 21 May, 1919.)

1. Wills—Devise—Restraint on Alienation.

A provision in a devise of lands to the testator's children that none of it should be sold or disposed of unless the devisee "desires to sell his part to one or both of" the others, and it appears that one of them has offered his share to the others, who had refused to purchase it: *Held,* the provision was a void restraint upon alienation of the land.

2. Contracts— Loans— Mortgages— Breach— Specific Performance— Damages.

An action for specific performance will not lie where the defendant has refused to lend money to a devisee upon his interest in the land, solely on the erroneous contention that plaintiff did not have the title thereto, the remedy being an action to recover damages for the breach of the contract.

APPEAL by defendants from *Allen, J.*, at the April Term, 1919, of WAKE.

This is an action brought by the plaintiff, Walter J. Norwood, against the defendant, Ralph H. Crowder, and also against the plaintiff's brother, W. H. Norwood, and sister, Rebecca Norwood Bryan, to have declared void a clause in the will of George W. Norwood, deceased, restricting the sale or disposition of a plantation thereby devised and also to compel said Crowder to perform his agreement to lend the plaintiff $1,000, secured by mortgage on plaintiff's share in said plantation.

George W. Norwood died domiciled in Wake County, North Carolina, on or about 23 March, 1915, seized in fee simple and possession of a plantation in said county of the value of about $20,000, and leaving a last will and codicil thereto which were duly probated and recorded. Said will (dated 12 July, 1910) contained the following clause:

"I give unto my sons, Walter J. Norwood, W. H. Norwood, and George W. Norwood, my plantation situate in Neuse River Township. None of this plantation is to be sold or disposed of in any way without one of the three sons mentioned above desires to sell his part to one or both of his brothers."

Said codicil (dated 14 January, 1914) contained the following clause:

"My son, George W. Norwood, having departed this life on the 16th day of January, 1913, it is my will and desire that my daughter, Rebecca W. Norwood, have the portion of my plantation that I had given in the within will to George W. Norwood (said plantation being in Neuse River Township, Wake County), upon the same terms and conditions."

By said will and codicil said plantation was devised to plaintiff Walter J. Norwood, defendant W. H. Norwood, and defendant Rebecca Norwood Bryan, the last having subsequently married J. Winder Bryan. That plaintiff Walter J. Norwood, following the wording of said will, offered to sell his share of said plantation to his brother, the defendant W. H. Norwood, or to him and his sister, the defendant Rebecca Norwood Bryan, jointly, and asked if they would not buy that he or they would lend him $1,000, to be secured by mortgage on said Walter J. Norwood's share of said plantation, but his said brother refused to either buy or make the loan, either singly or jointly with his said sister. The plaintiff, Walter J. Norwood, then made a similar offer and request to his sister, the defendant Rebecca Norwood Bryan, and she also refused to either buy or make the loan either singly or jointly with her said brother, the defendant W. H. Norwood. The plaintiff, W. J. Norwood, then applied to the defendant Ralph H. Crowder for a loan of $1,000, to be secured by first mortgage on his share in said plantation, and the said Crowder agreed to make said loan, but subsequently discovered that

said will contained said clause forbidding the sale or disposition of any part of said plantation by any one of said three children except to the other to wit: "None of this plantation is to be sold or disposed of in any way without one of the three sons mentioned above desires to sell his part to one or both of his brothers," and contended that by reason of said restrictive clause plaintiff could not convey or mortgage to him, the said Crowder, a good title to any part of said plantation, and said Crowder thereupon, solely on account of said restrictive clause, refused to make said loan and accept said note and mortgage therefor, which note and mortgage had theretofore been, and was then, duly tendered and to which said Crowder made no objection whatever except as to said alleged defect of title on account of said restrictive clause. The plaintiffs claim that said restrictive clause is void, and this suit is brought to have said restrictive clause declared void and to require said Crowder to perform his agreement and lend said $1,000, and to accept said note and mortgage. The said Crowder filed demurrer on account of said alleged defective title by reason of said restrictive clause, and expressly waived all objections to the title on account of the provision in said will and codicil providing for the payment of taxes on the town property out of the proceeds and profits of said plantation.

All the other defendants filed answer admitting all the allegations of the complaint. The court below entered judgment declaring said restrictive clause to be void and adjudging that plaintiff, Walter J. Norwood, recover of the defendant Crowder the sum of $1,000, and said defendant Crowder appealed.

Ernest Haywood attorney for plaintiff.
J. C. Little attorney for defendant.

ALLEN, J. Under the facts admitted by the demurrer, the brother and sister of the plaintiff having refused to buy his interest in the land or to lend him any money thereon, the provision in the will amounts to a total restraint on alienation and is therefore void. *Trust Co. v. Nicholson,* 162 N. C., 263; *Schwren v. Falls,* 170 N. C., 252; *Lee v. Oates,* 171 N. C., 721, and cases cited.

In *Wool v. Fleetwood,* 136 N. C., 465, where the subject is fully discussed by *Justice Walker,* it is *held,* citing *Dick v. Pitchford,* 21 N. C., 480, that the condition against alienation annexed to a life estate is void, and in *Christmas v. Winston,* 152 N. C., 48, citing *Lattimer v. Waddell,* 119 N. C., 370, that such a condition, whether annexed to a life estate or a fee, is not made valid because limited to a certain period of time.

It was also held in *Hardy v. Galloway,* 111 N. C., 519, which has been approved several times, that a clause in a deed reserving the right

to repurchase the land conveyed when sold came under the condemnation of the same rule, and this is in principle the case before us.

We do not, however, approve the measure of damages applied in the court below, but as the defendant is content to lend the money if the plaintiff can execute a valid mortgage, and makes no objection to the form of the judgment or to the amount recovered, we do not reverse the judgment on this account.

The action cannot be maintained for specific performance, nor is it an action to recover upon a promise to pay money, as the defendant has not agreed to pay anything to the plaintiff but has contracted to lend money upon a certain security, and upon breach of this agreement the action is to recover damages. *Coles v. Lumber Co.*, 150 N. C., 189.

Affirmed.

JENNIE HIPPS AND HUSBAND v. SOUTHERN RAILWAY COMPANY.

(Filed 21 May, 1919.)

1. **Common Law—Presumptions—Courts—Trials—Evidence.**

The laws of our sister State are applicable to the trial of a cause in our own courts when it arose there, with the presumption that the common law prevails in the absence of evidence to show otherwise.

2. **Carriers of Passengers—Waiting Rooms—Stations—Negligence—Heat.**

A common carrier of passengers is liable in damages for the sickness of a passenger caused by his having to wait for a late train, after having purchased his ticket therefor, in cold and inclement weather, in its waiting room, insufficiently heated, owing to the negligence of the carrier.

3. **Instructions—Expression of Opinion—Statutes—Negligence.**

A charge in a negligence case is not violative of our statute prohibiting the judge from expressing his opinion to the jury on the facts, because he instructs them that defendants may not always be punished for negligence, by reason of the use of the words "as in this case," when he further states, "if there is any injury," saying, in effect, that damages may not always be recovered for a personal injury.

4. **Same—Carriers of Passengers—Waiting Room—Heat—Stations.**

In an action to recover of the carrier damages alleged to have been caused a passenger by the negligent failure of the defendant to heat its waiting room in cold and inclement weather: *Held*, an expression in the charge, "was the negligent act of the defendant to furnish the heat the direct cause of the plaintiff's injury?" is not the judge's opinion upon the facts, forbidden by statute, when followed by the words, "if you find there was a negligent act"; and there is no merit to an exception to his statement that there was evidence to show the plaintiff suffered, when in fact there was such evidence.

5. Instructions—Fragmentary Parts—Negligence—Expression of Opinion.

In the plaintiff's action for damages arising from the defendant's negligent acts, the charge, construed as a whole, properly made the recovery to depend upon the establishment of the negligence alleged, and in this connection the judge said, "Was the failure of defendant's duty the cause of the plaintiff's sickness," etc., which is *held* not an expression of the judge's opinion upon the facts prohibited by our statute.

6. Same—Separate Waiting Room—Stations—Statutes—Common Law.

A charge of the court upon the duty of a common carrier to provide and sufficiently heat in cold and inclement weather its separate waiting rooms for white and colored people, under the provisions of our State, is immaterial and harmless, where the cause of action arose in another State, and the common law is presumed to be applicable if, in fact, the carrier had provided the separate waiting rooms at the station in question.

7. Instructions—Appeal and Error—Favorable Charge.

A charge of the court to the jury that is favorable to the appellant cannot be considered as reversible error.

APPEAL by defendant from *Harding, J.*, at the January Term, 1919, of CABARRUS.

This action was brought by the plaintiffs to recover damages alleged to have been suffered by the *feme* plaintiff on account of the negligence of the defendant in failing to have its waiting room at Wellford properly heated.

On 19 January, 1916, after having spent some weeks visiting relatives near Wellford, S. C., the *feme* plaintiff purchased tickets of the defendant at Wellford, S. C., for transportation to Concord, N. C. She offered evidence tending to prove that the weather was very cold, that she and her three children were brought to the station at Wellford, a distance of four miles, in a wagon; that she arrived there at about 2 p. m., intending to take train No. 12, which would carry her to Concord, N. C.; that train No. 12 was two hours or more late; that she and her children went into the waiting room. There was no fire there. They remained in this waiting room twenty or thirty minutes, and were taken into the operator's room, where there was a fire, and where she remained about thirty minutes until Mr. Hipp, her brother-in-law, had to leave so that he could get home before night; that when her brother-in-law left the room she took her children and left also, and went again into the waiting room where there was no fire, and where she had been before and found no fire; that she remained in this room until No. 12 came, some two hours later; that she then boarded the train and went to Concord, a distance of something like 80 or 100 miles, without ever getting warm, and that she was sick for about two weeks.

The plaintiff testified that she left the operator's room when her

brother-in-law started home because it was a small crowded place and there were four or five negroes in there. Also that the agent of the defendant was notified that there was no fire in the waiting room.

There was a verdict and judgment in favor of the plaintiff and defendant appealed, assigning as errors relied on:

1. That the court erred in stating to the jury "So it does not follow that every time a man is injured or a woman is injured (as in this case), if there is any injury, that he or she has the right to call on somebody to punish them for it," the exception being to the use of the words "as in this case."

2. That the court erred in charging the jury, "Was the negligent act of the defendant to furnish heat for the plaintiff at its railroad station at Wellford, S. C., if you find there was a negligent act, was that the direct and natural owing cause of the plaintiff's injury which she has alleged (and which there was evidence tending to show she has suffered)?"

3. That the court erred in charging the jury, "Was the failure down there the cause of her sickness, her ill health; did it bring it about? Or if it did not bring it about originally, did it accentuate or accelerate it or increase it or exaggerate it?"

4. That the court erred in charging the jury, "It was the duty of the railroad company to maintain separate waiting rooms, and if the railroad company permitted the white waiting room to be in such condition there from cold or otherwise so that it could not be occupied with reasonable safety, with reasonable comfort to its passengers, and by reason of that the plaintiff had to go out of that room and go into another room where there were colored men, that was negligence."

5. That the court erred in charging the jury, "If you find that the railroad company negligently failed to provide for her there so that she had to withdraw from that room and go into another room occupied by colored people, either as employees or passengers, then the court charges you, gentlemen of the jury, that would be negligence."

6. That the court erred in charging the jury, "If the plaintiff has failed to satisfy you that the negligence of the defendant was the proximate cause of the injury, then you would answer the issue 'No.'"

7. That the court erred in charging the jury, "She could recover the damages she has sustained, by reason of the (defendant's negligence), as the proximate cause, and for nothing else."

Maness & Armfield attorneys for plaintiff.
L. T. Hartsell and Caldwell & Caldwell attorneys for defendant.

ALLEN, J. The cause of action arose in the State of South Carolina and it must be tried under the laws prevailing in that jurisdiction

(*Harrison v. R. R.*, 168 N. C., 384), but as no evidence was introduced upon this question the presumption is that the common law is in force in that State. *Hall v. R. R.*, 146 N. C., 351; *Carriage Co. v. Dowd*, 155 N. C., 316.

The principle of the common law pertinent to the facts in this record is stated in 10 C. J., 922, as follows: "It is the duty of the carrier to keep the station or waiting room reasonably safe, comfortable, and decent, and a passenger suffering injury by reason of being unable to sit therein when he desires, and it is proper for him so to do, may have damages for injuries suffered. Thus the carrier may be liable for injuries suffered by a passenger by reason of the waiting room not being properly heated and ventilated, particularly where there is a statutory provision requiring it to be heated in cold and inclement weather, although such a statute does not relieve the carrier of its common-law duty so to do," and also in 4 R. C. L., 1074, "Though the subject of statutory enactment in some States, yet independent of such statutes, a carrier owes to its passengers, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where they may await the arrival of trains, and it is also the duty of the carrier to keep its station or waiting rooms open, heated and lighted, for a reasonable time before and after the time advertised for the arrival and departure of trains, and it will be liable for any injury which is the proximate result of its breach of this duty."

Applying this principle to the facts not in dispute, his Honor might have instructed the jury that the defendant was negligent in any view of the evidence, as it is not controverted that the plaintiff had purchased a ticket from the defendant; that she was in its waiting room for more than two hours waiting for a delayed train; that it was very cold weather in January; that there was no fire in the waiting room, and her evidence that she suffered severely from cold is not contradicted, and if so, any error in the instruction in assignment 5 would be harmless, as would be any expression of opinion alleged in assignments 1, 2, and 3. We do not, however, think there was any expression of opinion.

The use of the words "as in this case," pointed out in the first assignment, is followed by the words "if there is any injury," and when considered as a whole his Honor was simply applying to the case before him the principle that it did not follow that a party could recover damages, although injured.

In the second assignment the language, "was the negligent act of the defendant," would be an expression of opinion if it was not followed by the expression, "if you find there was a negligent act," and it was not error to say to the jury, "and which there is evidence tending to show she suffered," as the record fully sustains the statement. *Lewis v. R. R.*, 132 N. C., 386.

The excerpt from the charge in assignment three follows immediately after the part of the charge copied in assignment two, and when read together is predicated on a finding by the jury of a failure of duty on the part of the defendant, and is free from objection.

The error complained of in the fourth assignment is that his Honor told the jury "it was the duty of the railroad company to maintain separate waiting rooms," and is upon the ground that the action is to be tried by the laws of South Carolina, and that there is no such common-law duty and no evidence of any duty imposed by statute in South Carolina.

By reference to the charge it will be seen that the statement of the duty was in reference to the law of this State, but in any event the charge is immaterial as the evidence of the plaintiff and defendant shows that the defendant maintained separate waiting rooms in South Carolina.

The charge in the sixth assignment is favorable to the defendant, and in the seventh is a part of the charge on damages, predicated upon a finding that the plaintiff was injured by the negligence of the defendant.

No error.

F. G. BREWER AND WIFE, M. S. BREWER, v. J. W. RING AND A. DE T. VALK.

(Filed 21 May, 1919.)

1. **Pleadings—Amendments—Court's Discretion—Appeal and Error.**

The action of a trial judge in permitting an amendment to an answer during the trial is a matter within his discretion and not reviewable on appeal in the absence of gross abuse thereof.

2. **Evidence—Pleadings—Amendments—Physicians and Surgeons—Malpractice—Appeal and Error—Harmless Error—New Trials.**

Where the trial judge has permitted the defendant to amend his answer during the trial of an action against a physician to recover damages for alleged malpractice, so as to deny an allegation charging negligence and a lack of proper or ordinary skill, and it appears that frequently in the pleadings this allegation has been made and denied, and the amendment permitted was to correct the only instance where the allegation had been admitted, the refusal of the trial judge to permit the plaintiff to introduce the original complaint and answer containing this admission, if erroneous, was harmless, such evidence being so infinitesimal that it could not possibly have changed the verdict in defendant's favor were a new trial awarded thereon.

3. Appeal and Error—Verdict—Cause of Action—Damages—Harmless Error—Physicians and Surgeons—Malpractice.

Where the jury have rendered their verdict in the defendant's favor in an action for damages against a physician for malpractice in unskillfully and negligently diagnosing and operating upon a married woman for tumor, mistaking pregnancy for it, the admission of evidence as to whether hernia resulted from the operation, addressed to the separate issue of damages, is harmless, if erroneous and without prejudice, for upon the failing of the cause of action no damages are therein recoverable.

4. Evidence—Physicians and Surgeons—Diagnosis—Opinions—Malpractice.

In an action against a physician to recover damages for malpractice, medical expert opinion is competent upon the questions as to whether he had properly and sufficiently made the diagnosis of the case in his erroneous treatment of a pregnant woman for tumor, under the evidence in the case, and as to whether the defendant should have detected the pregnancy during the course of his examination made with the proper exercise of the ordinary skill and medical knowledge of an average practitioner, and according to the approved practice and principles of the medical profession.

5. Appeal and Error — Objections and Exceptions — Evidence — Experts—Courts.

Objection that a witness, who has not properly qualified as an expert, has been offered and testified as such, comes too late when such special ground is stated for the first time after the verdict, though a general exception had been taken, as the trial judge should be afforded an opportunity to hear and determine upon the qualifying evidence, and would no doubt have heard evidence upon the question if the matter had been properly called to his attention.

6. Issues—Court's Discretion.

The rejection of issues tendered to the trial judge is not error when the issues submitted arise from the pleadings, are supported by the evidence, and are sufficient to determine the rights of the parties and to support the judgment, the form and number thereof, when meeting these requirements, being within the sound discretion of the trial judge.

7. Instructions—Contradictory Requests.

Where the question involved in an action against a physician for damages is whether the defendant should have discovered that his patient, a married woman who was pregnant, but whose case he had diagnosed and treated as one of tumor, for which he performed a surgical operation, a prayer for instruction which is contradictory and confusing, in assuming that a serious operation was to be performed for tumor to which plaintiff assented, and in another part that the plaintiff had not been informed thereof, is misleading to the jury, and was properly refused.

8. Physicians and Surgeons—Diagnosis—Negligence—Treatment—Operation—Mistake—Evidence—Questions for Jury—Trials.

Where a physician has carefully obtained the necessary data for the diagnosis of a case by a proper examination of his patient and from information given him by the patient and other reliable sources, and

possessing the requisite qualifications, applies his skill and judgment with due care, he is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making the diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice; but if he negligently omits to inform himself of the facts and circumstances, and injury results therefrom, he is liable for the consequent damages, the question of negligence being one for the jury when it arises upon the pleadings and the evidence in the case.

ACTION tried before *Cline, J.*, and a jury at October Term, 1918, of WILKES.

Plaintiffs sought to recover damages for malpractice of defendants, physicians and surgeons, in wrongly and negligently diagnosing the *feme* plaintiff's pregnancy as a case of fibroid tumor of the uterus or an ovarian tumor. There was much evidence taken at the trial upon the questions of negligence and damages as to each of the two defendants, and the jury returned the following verdict:

"Were the plaintiffs injured by the negligence or want of skill of the defendants, or either of them? Answer: 'No.'"

There were two other issues as to the damages each of the plaintiffs was entitled to recover, but as the verdict upon the first issue was adverse to them they were, of course, not answered, as it was not necessary that they should be. It is alleged in the complaint that the doctors, after their examination had been made—each acting separately in making it, and consulting thereafter together in regard to it—reported that the *feme* plaintiff was suffering from an ovarian tumor of rapid and malignant growth, and that an immediate operation was necessary, and that when the incision in the abdomen was made so that the ocular proof of her condition was afforded and her real trouble was disclosed, it was found that there was no tumor, but that instead she was between four and five months advanced in pregnancy. That for the purpose of the operation she was taken, under the advice of Dr. Ring, to the Twin City Hospital at Winston-Salem, where Dr. A. de T. Valk resided, and where, in the hospital, he first made his examination of her and pronounced her ailment that of an ovarian tumor of rapid growth, calling for an immediate operation.

It is further alleged that when they were informed by the physicians and surgeons as to the cause of the *feme* plaintiff's then physical condition, both plaintiffs urged that she go to the hospital at Baltimore for further diagnosis and treatment, when Dr. Ring protested against such a course, and insisted that, in view of the seriousness of her trouble, she be carried at once to Winston-Salem, as delay would be dangerous,

if not fatal; he further asserting that Dr. Valk was the most skillful surgeon in the State, and all would be well. That, after both examinations had been completed, the defendants declared that their knowledge of her case was sufficient; their diagnosis was positively correct; that they knew what they were doing; that no further diagnosis was necessary or required; that they knew for a certainty that an ovarian tumor existed and that it required an immediate operation to prevent death. That upon this representation, and trusting to the skill and ability of her physicians and surgeons, the plaintiffs yielded to their advice, the *feme* plaintiff submitting to the operation with her husband's consent, and the same was performed with the result above stated. That morphine was injected into her arm and anesthetics administered until she was sufficiently under their influence, when the incision, eight or ten inches in length, was made in the abdomen, which exposed the internal organs and showed the diagnosis to be false, as the *feme* plaintiff was only normally pregnant, and there was no indication of tumor. The surgeon's wound was closed, the patient recovered of it, and in due course was delivered of her child without any untoward incident in the accouchement. She afterwards, within the usual period, was restored to her normal health.

It is further alleged "That the defendants negligently performed the operation without possessing or exercising the knowledge and skill possessed by the ordinary physician in surgery, and without possessing and exercising this knowledge did negligently and carelessly undertake to diagnose and determine the condition of the *feme* plaintiff; and did, without possessing and exercising the skill and knowledge possessed and exercised by the ordinary physician and surgeon, carelessly, negligently, and erroneously diagnose and determine that the said *feme* plaintiff was suffering from an ovarian tumor of rapid growth, when in fact she was not so suffering, and that the defendants knew or should have known it by the exercise of the ordinary knowledge and skill possessed by the average physician and surgeon," thereby requiring long confinement of *feme* plaintiff to her bed and causing her great bodily pain, and also mental anguish in many ways, which are particularly set forth, and the loss of services and other benefits, to her damage ten thousand dollars.

The defendants distinctly and circumstantially denied, except in one respect, each and every allegation of negligence or malpractice, and the existence of any fact tending to show it, or to prove that they acted otherwise than the most careful and skillful physician or surgeon would have done under like circumstances, and also denied all right to damages, and this denial made up the issues submitted to the jury.

The complaint was amended so as to allege that the incision was too

long, and that this error in operation caused hernia, which it appears developed some time after child-birth. This also was denied.

We will now state, in substance, the contentions of the parties, with such allusions to the testimony as may be thought proper to give a clear apprehension of the case from the two different standpoints:

The plaintiffs contended that, upon the evidence, it appeared that the *feme* plaintiff was not suffering from tumor of any kind, but was in a normal condition, with the exception of the unusual menstrual flow during her state of pregnancy, and the fact that she experienced no symptoms, such as nausea, and so forth, indicating that she was pregnant. That the surgeons had made an exceedingly superficial diagnosis, and one not calculated to disclose, with any reliable degree of certainty, her real condition, and that in not making a closer and more minute examination of her body, as a careful physician of ordinary knowledge and capacity would and should have done, they were misled by their own fault in this respect, and thereby caused the *feme* plaintiff great and unnecessary suffering of mind and body, and her husband great mental anguish and the loss of her society and services, and subjected him to great expense laid out in her cure and restoration to health. They assert that defendants should have been more skillful and careful in their diagnosis and treatment of their patient, especially in view of the urgent appeal made to them by plaintiffs that she be taken to Baltimore for further observation and study of her case, which they predict would have resulted in a different diagnosis and the ascertainment of her real condition, and would have saved her from the serious operation she underwent and its attendant suffering and anxiety, and left her in a normal state of health and strength to withstand and overcome the perils of pregnancy and child-birth. They also complain of the hernia which followed the useless operation to which she was subjected. They allege, with testimony to support them in their contention, that there were other well-known tests for determining a case of pregnancy which were not resorted to by the defendants, and that in all they did there was a total lack of proper care, caution, knowledge and skill, which resulted in her injury; and further and lastly, that they did not give their consent to an exploratory operation, but having been assured of the presence of a malignant tumor requiring immediate surgical interference to save life, they consented, and she submitted only to that kind of operation, relying upon the superior knowledge and skill of the defendants to acquaint them with the facts and to advise as to the proper course to be taken.

The defendants, on the contrary, contend, and refer to evidence to sustain them, that the sole theory of the complaint was a negligent mistake in diagnosis, in that the defendants, thinking the *feme* plaintiff had

an ovarian cyst or tumor, operated on her for that condition when in fact she was pregnant, which was disclosed at the time of the operation. The contention of the defendants was that it was very difficult to determine the true condition of the *feme* plaintiff, and that in their opinion the indications were that it was an ovarian tumor or cyst, but that the true condition could not be determined other than by an exploratory operation, and that this was the nature and character of the operation. The *feme* plaintiff is a married woman forty-seven years old, and prior to the date of her visit to Dr. Ring at Elkin on 8 January, 1917, had given birth to three children at intervals of three and two years, and that at these births conditions were normal, the last of the children having been born twelve years prior to her visit to Dr. Ring; that from the date of the birth of the last child until the latter part of August, 1916, the *feme* plaintiff was regular in her periods, and that on or about 21 September, 1916, was noticed the first irregularity, the period at that time being partially suppressed, continuing with slight but constant flow, and broken by periods of one or two days with an absence of flow, with the exception of one week; these conditions continued until 8 January, 1917. That at the time of her visit to Dr. Ring the *feme* plaintiff herself had not observed any signs of pregnancy, but thought she had a tumor, and so stated to Dr. Ring, at the same time also stating to him the history of her case as just detailed. There was an apparent enlargement of the abdomen. Without coming to a definite conclusion as to the true condition, but strongly suspecting a tumor, Dr. Ring advised that she go to Winston-Salem for consultation with Dr. Valk, looking to an operation. On 12 January, 1917, Mr. and Mrs. Brewer, accompanied by Dr. Ring, came to Winston-Salem, and went to the Twin City Hospital, arriving late in the afternoon. After supper Dr. Valk made an examination of Mrs. Brewer, she at the time being undressed and in bed. (Dr. Ring had made his abdominal and vaginal examination of the patient while she was standing in an erect position.) Dr. Ring then gave Dr. Valk the history of the case that he had received. In addition to the information received from Dr. Ring, Dr. Valk was told by Mrs. Brewer that she had not had any pain or nausea, and that there had been no cancer or tuberculosis in the family. Mrs. Brewer at the time gave to Dr. Valk practically the same history, only in greater detail, that she had given to Dr. Ring, Mrs. Brewer stating to Dr. Valk her belief that she had a tumor. Dr. Valk made a vaginal examination with the patient in bed, and also made an external examination, the vaginal examination being made with the right hand on the abdomen and the two fingers of the left hand in the vagina, which disclosed a rather indefinite mass in the lower part of the abdomen, the mass being smooth, inclining to be a little harder on the right side than

on the left. This mass was attached to the neck of the womb or cervix, which was exceedingly hard, and at that time the patient was bleeding. As a result of this examination, Dr. Valk diagnosed it as a sub-mucuous fibroid tumor, or possibly a cyst. There were two examinations made by Dr. Valk, one after supper of the day of the arrival the next one the second or third day afterward. Dr. Valk reported to Mr. Brewer his diagnosis, qualifying it by the statement that he was not sure of the condition, and suggesting an exploratory incision, meaning by that an incision for opening the abdomen with a view to ascertaining the true condition. The real point at issue in this case was the allegation of wrongful or mistaken diagnosis. Upon this point all of the physicians agreed that there were conditions under which the diagnosis and conclusion as to the choice between pregnancy and tumor is attended with extreme difficulty, and that all physicians make mistakes in that respect. Six physicians other than the defendants, testifying for the defendants, and one physician testifying for the plaintiff, stated that, under the circumstances of this case, it was extremely difficult to know the true condition, and all of defendants' experts agreed that under the circumstances an exploratory operation was not only the wisest course to pursue but was necessary and in entire accord with good practice. Two physicians testified for the plaintiff, Drs. Duncan and Choate. The latter was not asked for his opinion or views upon the question of diagnosis, his testimony dealing entirely with hernia. Dr. Duncan was asked by the plaintiff a hypothetical question to ascertain his opinion as to whether the defendant Ring was guilty of negligence, and his answer was, "On account of the abnormal conditions, I am of the opinion that he did use ordinary skill." The abnormal condition to which the doctor referred was the continuous flow. Among the physicians testifying for the defendants were Dr. H. F. Long, of Statesville; Dr. J. M. Reece, of Elkin; Dr. F. H. Gilreath, of Wilkesboro; Dr. A. J. Williams, of Greensboro, and Drs. W. L. Grimes and W. M. Johnson, of Winston-Salem. Drs. Long, Grimes, and Williams are specialists in surgery. Drs. Reece, Gilreath and Johnson are general practitioners. Dr. Ring made the somewhat remarkable statement that he had delivered about 3,000 women and that only one was over the age of forty-seven years. Dr. J. M. Reece stated that he had delivered approximately 2,500 and, with the exception of Mrs. Brewer, he had delivered only one other over forty-seven years of age. There was no dispute among the physicians but what ventral hernias appear in a woman who had not had an abdominal incision. It was likewise agreed that if the hernia in this case was in any way attributable to the incision, it would in all probability have appeared at or shortly after the birth of the child, the fact being that in this case Mrs. Brewer did not observe

any signs of the hernia for several months after the birth of the child. Mrs. Brewer was attended by Dr. J. M. Reece. The birth of the child was entirely normal in every respect. Upon the question of the propriety of the exploratory operation, we quote from the testimony of Dr. H. F. Long: "When a physician cannot ascertain and make out the condition of the patient by a diagnosis to his entire satisfaction according to the ordinary gentle methods, such as palpitation externally and a very slight vaginal examination, and, above everything, a very careful history of the case by the patient's own statement, and if after recording the history and making the ordinary abdominal examination with the finger, called the digital examination, he is then in doubt, he is warranted in making an exploratory incision. Contrasting the dangers of letting the condition alone, whatever it may be, when there is a suggestion of pregnancy and tumor, and when there is bleeding, I should say the question should be settled, because the bleeding may mean death on short notice." Dr. Long, together with other physicians, expressed the opinion that the operation did not cause the hernia.

This recital presents fairly the material questions in the case, according to the versions of the respective parties, as stated in their briefs. There was a judgment upon the verdict, and the plaintiffs appealed.

Charles G. Gilreath for plaintiffs.
F. B. Hendren and J. F. Hendren for defendant Ring.
Hayes & Jones and Manly, Hendren & Womble for defendant Valk.

WALKER, J., after stating the facts: We have stated that the defendants denied categorically all allegations of negligence or want of skill, except in one instance. The seventh section of the complaint charged negligence and a lack of proper or ordinary skill as against Dr. J. W. Ring, and in his answer to that paragraph he admitted the charge. Defendant asked that he be allowed to amend and substitute a denial, as the admission was manifestly an inadvertence. The request was allowed, and the pleading accordingly amended. Plaintiff afterwards offered the originals of the section and the answer thereto in evidence. On objection of the defendant, they were excluded. This may have been error, although the admission, when considered with the other parts of the pleading and the circumstances under which the admission was made, was the very slightest proof, if proof at all, of the fact of negligence. We will assume it was error to exclude this evidence, and when we do so we find no substantial or prejudicial effect in the ruling. If we read the entire pleading it is as plain as it could possibly be that the word "admitted" was substituted for "denied" by the clear inadvertence or misprision of the clerk, stenographer, or typewriter who

copied the pleading or by the pleader himself, if in his own handwriting. The context shows, without the shadow of a doubt, what was meant. The charge of negligence was made more than once and each time, except the one in question, it was emphatically denied. The judge may have erred, and perhaps it would have been better to have admitted the papers in accordance with our settled rule, but the ruling was such a slight, infinitesimal and attenuated departure from the correct line of decision, as fixed by us in such cases, that we count it as having no appreciable weight in contributing to the general result. No one could well read the answer of Dr. Ring without clearly understanding that both defendants, who acted in cooperation, intended to make sweeping denial of each and every allegation of negligence or a want of knowledge and skill, and such a denial constituted the warp and woof of their pleading. Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2 Ed.), secs. 1 to 7. The motion should be meritorious and not based upon merely trivial errors committed, manifestly without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have long ceased to have that effect and have become obsolete. The law will not now do a vain and useless thing. *S. v. Smith,* 164 N. C., 476; *Schas v. Asso. Society,* 170 N. C., 420, 424. It is said in 3 Graham and Waterman on New Trials, 1235: "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is in no sense injurious, for it wounds the feelings. But this alone is one sufficient ground for a new trial. It does not necessarily involve *loss* of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury, otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no

purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit." *Hulse v. Brantley,* 110 N. C., 134; *Alexander v. N. C. Trust Co.,* 155 N. C., 124; *McKeel v. Holloman,* 163 N. C., 132. See, also, *Grice v. Ricks,* 14 N. C., 62; *Gray v. R. R.,* 167 N. C., 433. Tried by this rule, so well stated by that standard authority, the objection cannot be sustained. The judge had the discretion to permit the amendment, and we do not review the exercise of the same, in the absence of gross abuse, which certainly does not appear here. Pell's Revisal, Vol. I, secs. 505, 507, and notes of cases. The Code policy as to amendments is a liberal one and the discretionary power of the court is given to secure and promote a trial upon the merits and to prevent a failure of justice. *Blalock v. Clark,* 133 N. C., 309; *Reynolds v. R. R.,* 136 N. C., 345. See Pell's Revisal, Vol. I, p. 237, sec. 507, for other cases. This disposes of assignments of error A and B.

We are unable to discover how the evidence as to the hernia worked any harm to the appellants, as it related solely to the issues as to damages, and they lost their case on the first issue. If there is no cause of action there are no damages. The ruling, if erroneous, was, for the reason just stated, without any prejudice. *Butts v. Screws,* 95 N. C., 215; *S. v. Smith, supra; Collins v. Collins,* 125 N. C., 98; *May v. Gentry,* 20 N. C., 249; *Gray v. R. R., supra.* If erroneous it was rendered harmless by the verdict. *Graves v. Trueblood,* 96 N. C., 495; *Vickers v. Leigh,* 104 N. C., 248; *Perry v. Ins. Co.,* 137 N. C., 402. It was competent to examine the medical experts upon questions relating to their particular science. We could obtain reliable information upon scientific subjects in no other way, and the jury would be left to guess or grope in the dark, instead of having trustworthy knowledge as to these special matters of inquiry, if their opinions were not admitted for the purpose of enlightening the jury upon such questions as are peculiarly within their knowledge, which they have acquired by actual study, experience and practice. Lawson on Expert and Opinion Evidence (2 Ed.), p. 123; *S. v. Slagle,* 83 N. C., 630; *S. v. Sheets,* 89 N. C., 543; *S. v. Bowman,* 78 N. C., 509; *S. v. Secrest,* 80 N. C., 450; *S. v. Cole,* 94 N. C., 958; *S. v. Wilcox,* 132 N. C., 1134. It was, therefore, competent to ask the witness whether, in his opinion, upon the facts stated in the hypothetical questions, if found by the jury upon the evidence, the diagnosis was made according to the approved practice and principles of the medical profession. Rogers on Expert Testimony (2 Ed.), sec. 64; *Twombly v. Leach,* 11 Cash (Mass.), 405; *Wright v. Hardy,* 22 Wis., 348; *Hoener v. Koch,* 84 Ill., 408; *Mertz v. Detweiler,* 8 W. & S. (Pa.), 376; *Heath v. Glisan,* 3 Oregon, 67; *Roberts v. Johnson,* 58 N. Y., 613, 615; *Mayo v. Wright,* 63 Mich., 32; *S. v. Bowman, supra; Sawyer v. Berthold,* 116 Minn., 441; *Sly v. Powell,* 87 Kansas,

142; *Taylor v. Kidd,* 129 Pac. (Wash.), 406. It has been held competent to ask whether an autopsy had been properly made, *S. v. Moxley,* 102 Mo. 386; whether it was necessary to remove one eye to save the sight of the other, which was endangered by sympathetic inflammation, *Reid v. City of Madison,* 85 Wisc., 667; whether a limb of the patient was or not in as good condition as the average of those treated by skillful physicians or surgeons in like cases, *Olmstead v. Gore,* 100 Pa. St., 127; and there are in the books other apt illustrations which are almost without number.

Expert testimony as to malpractice cases are well considered and discussed in Rogers on Expert Testimony (2 Ed.), at p. 148, sec. 64. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known, admitted or hypothetical state of facts. *U. S. v. McGlue,* 1 Curtis, 1; *Heald v. Thing,* 45 Me., 392; 1 Greenleaf on Evidence, sec. 440; 1 Wharton on Ev., 452; Wharton's Cr. Law, sec. 50 f; *S. v. Wilcox, supra; Summerlin v. R. R.,* 133 N. C., 554; *S. v. Bowman, supra.* The rule is that the expert must base his opinion upon the supposition that the jury will find the facts recited in the hypothetical question, and there must be evidence of those facts. Rogers on Expert Testimony, sec. 27; *S. v. Bowman, supra; S. v. Cole, supra; S. v. Wilcox, supra; Woodbury v. Obear,* 7 Gray (Mass.), 457; *Com. v. Rogers,* 7 Metcalf (Mass.), 500; *Summerlin v. R. R., supra.* If the plaintiffs objected to the questions addressed to the doctors because it had not been shown that they were experts, they should have made it known, as they cannot be silent when they should have spoken and after verdict advance the objection on this ground for the first time. *Summerlin v. R. R., supra.* If they had intended to rely on any such ground, and had stated such an intention to the judge, he would have heard the preliminary proof, found the facts and decided upon their competency as experts. *Summerlin case, supra.* But the physicians were all experts, as the evidence overwhelmingly shows. The court expressly found that Dr. Duncan was an expert, and it was to the questions propounded to him as such that the objection just considered was directed. The answers given by the experts were all competent, as they were the expressions of their opinions upon the question of malpractice, and as to whether the diagnosis was properly and sufficiently made; also as to whether the two diagnosticians should have detected the pregnancy during the course of their examinations or by the use of the ordinary skill and the medical knowledge of an average practitioner.

This brings us to the question of issues, requests for instructions, and the charge of the court. The issues submitted were sufficient to develop the entire case equally for both parties, and where this is so the rejec-

tion of other issues tendered is not error. The form and number of the issues is within the sound discretion of the court, provided they are sufficient to determine the rights of the parties and to support the judgment. *Hatcher v. Dabbs,* 133 N. C., 239; *Garrison v. Machine Co.,* 159 N. C., 286; *Warehouse v. Ozment,* 132 N. C., 848; *Clark v. Guano Co.,* 144 N. C., 71; *Patterson v. Mills,* 121 N. C., 258; *Pretzfelder v. Ins. Co.,* 123 N. C., 164; *Strauss v. Wilmington,* 129 N. C., 99. There was sufficient averment in the pleadings to distinctly present the questions in controversy, and they could well have been considered under the issues, which were adopted by the court. *Hatcher v. Dabbs, supra.* The plaintiffs seem, by their prayers for instructions, to have considered the first issue as sufficient. They alleged that they consented only to the operation for tumor, and were fraudulently misled by the defendants. We do not think the evidence supports any such theory. The prayer for instruction, which was refused and is covered by exception No. 12, is confusing and somewhat contradictory. It assumes in one part that a very serious operation was to be performed for tumor, to which plaintiffs assented and the *feme* plaintiff submitted, and in another part, that they were not informed of the serious operation, so that the jury would have been misled by its form and language, if the instruction had been given. It appears also that the plaintiffs clearly consented to the operation and fully understood the situation, and the *feme* plaintiff had said enough to the physicians as to her condition to induce them to go on with it. They performed the operation with a double purpose, first to explore and discover the true condition, and then to operate further and more extensively if the situation proved to be serious and called for immediate and drastic treatment. This apparently was the understanding of all parties. But whether so or not, the instruction should not have been submitted as asked to be given. Dr. Duncan, the plaintiff's own witness, testified, and he concurred with the other doctors in this respect, that Dr. Ring used proper skill and judgment in making the diagnosis. He also said that the peculiar and abnormal conditions might well have misled the two doctors when they made their examination and formed their opinion, especially mentioning as one of these conditions the continuance of the menstrual flow after pregnancy. Dr. Choate, plaintiffs' witness, stated that ventral hernia arises sometimes from other causes than an abdominal incision. Dr. Valk testified: "Q. What do physicians and surgeons possessing and exercising the knowledge and skill ordinarily possessed by the average physician and surgeon do when there is a suggestion of either pregnancy or tumor with respect to an exploratory operation or the by-manual examination to ascertain the true condition? A. It is a question of whether they should attempt any examination through the vagina or through the

neck of the womb; it might bring about a miscarriage or an abortion. If they should make the incision, the harm to the patient is practically none." The doctors all agreed, except Dr. Choate, a young physician, that the hernia was not caused by the incision, and he seems to have doubted his own opinion as the hernia came later than was to be expected. But the evidence as to hernia was rendered immaterial by the verdict on the first issue.

We may now well consider what are the duties and responsibilities of a physician and surgeon in the diagnosis of a case and the treatment of a patient under his care. A physician entitled to practice his profession, possessing the requisite qualifications and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved or as to what should have been done in accordance with recognized authority and good current practice. Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such but whether he has treated the case carefully and has employed in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. There is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion, or in subsequent conduct in the selection and use of instrumentalities with which the physician may execute his judgment. If he negligently omits to inform himself as to the facts and circumstances, and injury results therefrom, then he is liable. 30 Cyc., 1578-9, at 13; *Stalock v. Holm,* 100 Minn., 276; *Johnson v. Winston,* 68 Neb., 425. The case of *Just v. Littlefield,* 87 Wash., 299, a well-considered and well-reasoned one, was much like our case in its facts. It was stronger for the plaintiff, because of the fact that other physicians had diagnosed the patient's complaint as that of tumor instead of pregnancy, and this was known to the defendant, who afterwards pronounced it a tumor and operated to find out if he was correct, and to remove the tumor and treat the disease if he was. *Judge Holcomb,* with the concurrence of all his associates, said: "At all events it would seem that, whether appellant did, under the circumstances and conditions shown to exist, proceed with due and ordinary care in treating the patient, was a question of fact for the jury." He then further says: "The principal question here in whether a physician is, as a matter of law, liable for a wrong diagnosis and ensuing treatment based thereon, even where there may be an honest difference of opinion among members of the medical profession as to the diagnosis, if the diagnos-

tician proceeded with due care, skill and diligence in treating the patient. The law is, of course, well settled that a physician is liable for a wrong diagnosis of a case, resulting from a want of reasonable skill or care on the part of the physician, and followed by improper treatment, to the injury of the patient. But unless improper treatment follows a wrong diagnosis gives no right of action." 30 Cyc., 1575; 5 Thompson Negligence, sec. 6717; *Richardson v. Carbon Hill Coal Co.,* 10 Wash., 648. There is an elaborate and most excellent note to that case, with a citation and a review of numerous decisions of the courts upon this important subject, with the following statement of the rule as the annotator's text: "A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment, and is not liable in damages for an error of judgment in making a wrong diagnosis of a disease in the absence of a failure to exercise reasonable care and proper professional skill." It would seem to be unnecessary to prolong this opinion with any further reference and discussion of the authorities, as we availed ourselves of the occasion to treat this question at length in the two recent cases of *Long v. Austin,* 153 N. C., 508, and *Mullinax v. Hord,* 174 N. C., 607.

Upon the general question as to the competency and value of expert opinions of other physicians and surgeons we may refer to *Sawyer v. Berthold,* 116 Minn., 441; *Sly v. Powell,* 87 Kansas, 142; *Taylor v. Kidd,* 129 Pac., 406. As to the use of the X-ray, *McGraw v. Kerr,* 23 Colo. App., 163, and in this connection it may be said that Dr. Long stated that the ray would be of no service at that stage of the pregnancy. Whether the fœtus was quick with life, so that the beatings or sounds of the heart could be detected by examination, was a question of fact for the jury to decide upon the evidence, as were the other questions involved (30 Cyc., 1588). Dr. Long stated that in some cases they cannot be heard, depending somewhat upon the conformation of the woman and her physical development, and that the seventh month is the average time for such manifestations.

In this case importance is attached by the experts to the statement of this good woman as to her condition and symptoms. She was clearly misled by the unusual symptoms, although she was the mother of three children, as it seems never to have occurred to *her* that conception had taken place and that she was in a delicate condition. We can well understand then—with all of this strong and almost irrefragable testimony in favor of the doctors who diagnosed her trouble—how the jury reached the conclusion that they had not been negligent or unskillful, and gave them the verdict. While we may sympathize with the *feme* plaintiff and deeply regret her misfortune, our plain duty is to execute

justice not based upon anything but the law and the evidence in the case. There has been a loss, no doubt, but no legal wrong or injury. The case was correctly tried.

No error.

COMMISSIONERS v. HALL ET AL.

(Filed 21 May, 1919.)

1. Taxation—Sheriffs—Set-off—Counterclaim.

The obligation of the sheriff to settle for the county taxes collected by him in accordance with "the list of taxables" furnished him, or of the taxpayer, does not rest upon contract or consent, and is not a debt in the ordinary sense but a charge imposed by the Legislature or under its authority for the collection of monies for immediate public purposes, permitting no offset or counterclaim by the sheriff claiming over-payment in his settlement for previous years, in an action to recover the amount due by him in accordance with the list furnished him for the current year.

2. Same—Statutes.

The State Auditor is permitted under our statutes, Rev., secs. 5246, 5261, to make deduction of over-payment in the settlement for taxes collected when there is error in the "clerk's abstract of taxables," and the sheriff is "charged with more than the true amount," etc., and though the same deductions and corrections are permitted the county in making settlement under Revisal, sec. 1376, these statutes are inapplicable when the credits claimed are not from either of these causes; and to allow them otherwise would be to permit an offset or counterclaim, which is not permissible.

APPEAL by defendant from *Finley, J.*, at the March Term, 1919, of YANCEY.

This is an action against the sheriff of Yancey County and the sureties on his bond to recover $10,578.30 alleged to be due on the taxes for 1916, and also to recover the penalties provided for by statutes for the nonpayment of said amount.

The defendants admitted that said amount was due upon the taxes of 1916, but pleaded that nothing was due the county on account of the defendant sheriff having paid more than was due on the taxes for the years 1913, 1914, and 1915.

His Honor rendered judgment for the amount due on the taxes of 1916 and for the penalties as demanded in the complaint, and the defendants excepted and appealed.

Hudgins, Watson & Watson attorneys for plaintiff.

Pless & Winborne and Merrimon, Adams & Johnston and Charles Hutchins attorneys for defendants.

ALLEN, J. The judgment from which the defendants have appealed was rendered upon the pleadings, and we must therefore accept the allegations of the answer by way of defense as true, and when so considered it appears that the defendant Hall collected the taxes of Yancey County as sheriff for the years 1913, 1914, 1915, and 1916; that he is indebted to the county for the taxes of 1916 in the sum of $10,578.30, and that by reason of mutual mistakes in settlements for former years, to wit, in 1913, $8,828.16, in 1914, $460.80, in 1915, $2,550.78, making a total of $11,839.74, he has a claim against the county amounting to more than is due on the taxes for the year 1916.

This presents a hard case, and particularly as to the penalties recovered against the sheriff and his securities, approximating $5,000, and we would afford relief if not restrained by well-settled legal principles.

The question was considered and the authorities cited in *Graded School v. McDowell,* 157 N. C., 317, in which the sheriff of Burke, admitting a balance to be due on the taxes for 1905 and 1906, asked to be credited with certain commissions on the collection of taxes for 1903 and 1904, which had not been allowed in his settlements. The court refused to permit any deduction from the taxes of 1905 and 1906 and said, "As against the balance due by the defendant as sheriff for taxes in his hands collected for the years 1905 and 1906, no counterclaim or debt of any kind, however, valid, can be sustained. This has been so fully discussed that it is only necessary to cite a few of the cases: *Wilmington v. Bryan,* 141 N. C., 679; *Guilford v. Georgia Co.,* 112 N. C., 37; *Gatling v. Comrs.,* 92 N. C., 536; *Cobb v. Elizabeth City,* 75 N. C., 1; *Battle v. Thompson,* 65 N. C., 406. In *Wilmington v. Bryan,* 141 N. C., 675, *Brown, J.,* says: 'No counterclaim is valid against a demand for taxes,' citing *Gatling v. Comrs., supra.* In same case, *Walker, J.,* in his dissenting opinion (as to other points) concurs as to this proposition, and says: 'Neither a taxpayer nor a sheriff can plead a set-off in a suit against him for taxes due and owing. . . . . This is so upon the ground of public policy. To permit a taxpayer or an officer charged with the collection of taxes to set up an opposing claim against the State or the city might seriously embarrass the Government in its financial operations by delaying the collection of taxes to pay current expenses,' citing the cases above quoted."

The obligation to pay taxes does not rest upon contract or upon the consent of taxpayers, and is not a debt in the ordinary sense of the word. Taxes are charges imposed by the General Assembly or under its authority for public purposes, and upon grounds of public policy; pleas of set-off and counterclaim are not allowed in behalf of the taxpayer or the officer because to do so would delay the collection and payment of taxes, and would deprive the Government of the means of performing its functions.

"To hold that a tax is liable to set-off would be utterly subversive of the power of government and destructive of the very end of taxation." Cooley on Taxation, quoted in *Gatling v. Comrs.*, 92 N. C., 540.

The statutes upon which the defendants rely (Rev., secs. 5246 and 5261) have no application to the facts in this record. The first permits a deduction by the State Auditor from the tax lists of "all overpayments in former settlements," and the second a correction by the same officer of any error "in consequence of any error in the abstract of the taxes sent to the auditor or otherwise," and while we think the same deductions and corrections may be made in settlements by the county, under section 1376 of the Revisal, which provides that settlements by the sheriff with the county treasurer shall be under the same rules and regulations as with the Auditor, the deductions under section 5246 are confined to overpayments arising "by reason of any error in the clerk's abstract of taxables," and the errors under section 5261 to those causing the sheriff to be "charged with more than the true amount with which he should be chargeable," and the credits which the defendants claim are not from either of these causes, but because, being charged with correct amounts, he paid more than was due, bringing the matter in defense within the principle of set-off.

The reason for thus limiting the operation of the statutes is that errors in the tax lists and in the records showing the amounts with which the sheriff should be chargeable can be easily ascertained by calculation and would not involve delay, while to go further would break down the principle that pleas of set-off and counterclaim cannot be allowed as against a claim for the payment of taxes, and we do not feel at liberty to extend the statutes beyond their declared purpose.

In the present case, although for the purpose of this appeal we must accept the allegations of the answer as true, the plaintiff denies that any error has been committed or that the defendant sheriff has paid more than was justly due for the years 1913, 1914, and 1915, and specially pleads full settlements made for those years, in one instance, for the year of 1913, showing that after having given a county warrant to the defendant for $4,005.76 when it was afterwards discovered that a mistake of $3,000 had been made in favor of the defendant sheriff, and by agreement of the parties this mistake was corrected and all matters fully compromised and settled between the plaintiffs and the defendants for that year.

If, therefore, we should sustain the position of the defendants it would be necessary for the allegations of mistake made by the defendants to be tried and investigated and all of the evils which the law has undertaken to prevent, arising from withholding the ordinary revenues of the county, would be present.

We have given the matter careful consideration and have concluded that the judgment must be

Affirmed.

CLARK, C. J., concurs in the opinion of the Court in all respects and in the reasons therein given. However, there are three additional grounds which it may be well to mention:

"Recoupment" and "set-off" were unknown at common law and were created only by statute. 34 Cyc., 625; *Boyett v. Vaughan,* 85 N. C., 363. "Counterclaim is broader and embraces as a general rule both recoupment and set-off, although broader than either," 34 Cyc., 630, and was unknown in this State until the Code of Civil Procedure, *Valentine v. Holloman,* 63 N. C., 475; *Gaither v. Gibson, ibid.,* 93, and cases cited to the above in Anno. Ed. and cases cited Clark's Code (3 Ed.), sec. 244.

Revisal, 481, specifies that the counterclaim must be either (1) "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action, or (2) in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action."

The plaintiff's cause of action does not arise on contract but is based upon the duty of the defendant sheriff to collect (Rev., 2867) and account to the plaintiffs for the county's moneys which he has collected as its agent and should have in hand (Rev., 298). Therefore:

1. The defendant cannot counterclaim and set-off against the plaintiff's demand that he should turn over to the county the money of the county which he has in his hands any indebtedness he claims against the county. There is no mutual indebtedness by reason of any alleged indebtedness to the sheriff by reason of error in settlement of his accounts of a previous year. For that the sheriff would have his action of debt against the county, but he cannot give himself a lien or priority by withholding the public money in his hands.

2. If this counterclaim could be set up by the defendant sheriff against the county on the ground that his obligation is merely a debt which he owes to the county, it would necessarily follow that he could not be indicted for embezzlement (Rev., 3408, 5195), for an indictment does not lie for the nonpayment of a "debt."

3. If the sheriff could counterclaim against the county it can only be because the county's claim is merely a debt and therefore he could in such case set off "any other cause of arising also on contract, and existing at the commencement of the action." This would enable any sheriff to buy up any indebtedness against the county, notwithstanding Rev., 3575 (if bought at par), and would put it in his hands to pay off such

indebtedness of the county as he thought fit out of the funds in his hands, leaving the current expenses of the county unpaid. For this reason there is a penalty on the sheriff of $1,000 and 10 per cent by summary judgment prescribed by Rev., 5248.

These considerations are embraced in some of the decisions cited in the opinion of the Court. It would be entirely destructive of the responsibility of the sheriff for the funds collected by him if he could thus counterclaim against the county. It is of the highest importance that the money which the sheriff receives on behalf of the county shall be promptly paid over without any delay. For this reason the money which he collects for taxes is not a mere debt due by him to the county, but it is the county's own funds for which he is made indictable for embezzlement for nonpayment to the county. He is made chargeable with the entire tax list when it is placed in his hands, and he is only excused from payment of any part thereof upon allowance by the county commissioners for "insolvents." He is also required to give bond for the faithful performance of his duty in collecting the taxes, and to pay over the taxes as fast as they are collected and never to retain more than $500 of the tax money at any time in his possession. Rev., 298 and 308.

IN RE WILL OF MARGARET DEYTON.

(Filed 21 May, 1919.)

1. Appeal and Error—Instructions—Directing Verdict—Evidence—Inference.

Where the trial judge instructs the jury, in an action of *devisavit vel non*, that they should decide for the caveators, if they found the facts to be as testified, the evidence must be taken as true and considered in the light most favorable to the propounders, and it constitutes reversible error if there is any inference of fact from the evidence, which the jury may have drawn, that would have sustained the validity of the writing as the will of the decedent.

2. Wills—Devisavit Vel Non—Signatures—Subscribing Witnesses.

Where upon the trial of an issue of *devisavit vel non* there was evidence that the mind of the testator, at the time of the execution of the paper-writing, was bright and alert, though he was physically weak and confined to his bed from the effect of the sickness from which he soon thereafter died; that the paper-writing offered for probate had been written at his dictation, afterwards approved by him, and signed or acknowledged in the presence of subscribing witnesses, who signed, one directly and the other impliedly, at his request, and each in his presence and with his knowledge, but not in the presence of each other: *Held*, that the circumstances and surroundings are sufficient for the jury to properly infer that the writing was legally executed and is a valid will.

3. Wills— Subscribing Witnesses— Signature— In Each Other's Presence— Statutes—Testator's Presence—Acknowledgment of Signature—Request of Testator.

It is not necessary to the valid execution of a will that the witnesses thereto subscribe their names in the presence of each other, Rev., sec. 3113, or that after the will had been drawn to the satisfaction of the testator and signed by him a witness had been sent for, and at the request of another, in his presence of the testator and with his concurrence, subscribed his name as such witness, after the acknowledgment of the testator, express or implied, from the circumstances, that the signature to the will was his own.

4. Wills—Subscribing Witnesses—Testator's Presence.

A subscribing witness to a will is in the presence of the testator, within the intent and meaning of the statute, when he signs his name thereto where the testator could have seen him do so under such circumstances as would prevent the substitution of another and spurious paper for the genuine one; and it is not required that the witness should have subscribed his name in the same room with the testator if the latter could see him at the time.

5. Wills—Subscribing Witnesses—Execution of Wills—Evidence.

The testimony of the subscribing witnesses to a will to the contrary does not preclude the propounders from showing by other evidence that the will was, in fact, valid and executed according to law, and where the testimony of the two subscribing witnesses is conflicting, as to whether one of them had signed in the testator's presence, it is for the jury to determine the fact under the evidence.

6. Wills—Form Sufficient—Separate Writings.

Two writings were offered for probate in common form, appearing to be memoranda of gifts to certain persons of specified personal property and an interest in a certain mine owned by the testator, and containing a disposition of the property remaining after the "foregoing bequests": *Held*, sufficient in form to pass the property as a valid will, where it is shown that the requirements of the statute as to the signature of the testator and the subscribing witnesses, etc., have been properly followed, and the two instruments have been properly identified and linked together as parts of the same instrument.

ACTION of *devisavit vel non*, tried before *Justice, J.*, and a jury, at February Term, 1919, of BUNCOMBE.

This is a proceeding begun before the clerk of the Superior Court of Buncombe County to probate a paper-writing purporting to be the last will and testament of Margaret Deyton, deceased, in solemn form. A caveat having been filed, the issue *devisavit vel non* was raised and the cause was transferred to the civil issue docket for trial upon that issue. At the February Term, 1919, it was heard by the court and a jury. At the close of the evidence the trial judge directed a verdict as appears hereafter in the record. The usual issue was submitted to the jury and answered in the negative, viz:

1. Are the paper-writings, or any part thereof, and if so, what part, the last will and testament of Margaret Deyton, deceased? Answer: "No."

The following is a statement of the material evidence introduced at the trial:

R. C. Pickens, a witness for the propounders, testified: "My name is R. C. Pickens, called Chris Pickens. Margaret Deyton called me 'Uncle Cris.' I was her uncle, and was her guardian, after the death of her father. She lived with me for ten or fifteen years. She died at my home, March, 1917. She was a little more than twenty-one years of age when she died. She had been in New Mexico for her health before she died. She was afflicted with tuberculosis, and had been sick a year or two before she went to New Mexico. She had to quit school before she graduated on account of her illness. She stayed at my home and attended school at Weaverville College. After her return from New Mexico she stayed at my house, and I saw her every day a great many times during the day, and up to the time of her death her mental condition seemed to me to be perfectly good, as good as ever I knew. I talked to her at different times. A good many people visited her during her last illness, among them Mrs. Guy Edwards, Mrs. Georgia Burgin, Dr. Gill and others. Mrs. Gale was her nurse. Margaret Deyton called my daughter, Mrs. Bates, 'Myrtle.' She called my wife 'Aunt Mollie.' My son-in-law, Mr. Bates, 'Burt.' She called her sister 'Mollie.' That was her only sister. She did not have any brothers living. Her father and mother were both dead, and she had one brother and one sister who died before her death. Margaret was about one year old when her mother died. She was younger than her sister Mollie. Her mother was half-sister to my wife. Margaret owned one-half interest in a place at Black Mountain that was estimated to be worth $5,000. Her sister owned the other half. She also had property in Yancey County. I have been on the property a great many times. I guess it is worth four or five thousand dollars. There is a mine on the place that I, as her guardian, leased to a mining company. They mined feldspar and mica. Under the lease I gave them, they were to pay fifty dollars per month as a minimum, and for whatever above the minimum they produced they were to pay a royalty of seventeen cents per ton on. This mine belonged to these two girls, as well as the Black Mountain place. Also a little mountain piece, worth four hundred to five hundred dollars, near Black Mountain."

Mrs. Georgia Burgin, witness for the propounders, testified: "I knew Miss Margaret Deyton, and had known her from the time she was a baby. From the time when Mr. Pickens took her, when she was a year and a half old, I guess. Mr. and Mrs. Pickens took her and raised her

from the time she was something like one and one-half years old. I live about one-fourth mile from them, something less than a quarter of a mile. I am sure I saw her after she came back from New Mexico. Physically, she was very weak when she came back. I talked to her a number of times. I saw her several times a day when she was sick and was there three whole nights and a half in one week. I heard Margaret say that she intended to educate Mary Margaret. She was a cousin to the mother, Mrs. Myrtle Bates, Mr. Pickens' daughter. Mary Margaret was the oldest child of Mrs. Bates and the only child that she had at that time. The Margaret in the child's name was for Margaret Deyton. Margaret Deyton was away in New Mexico for a year before the death, and it was a year before that she had been afflicted with the disease. She had to leave school a year before she went away. I heard her say that she intended to educate her namesake, Mary Margaret. That was in the early part of the summer or early fall before she went to New Mexico. Margaret and her cousin, Mrs. Bates, were like sisters. It seemed to me they were almost like sisters. Miss Myrtle Pickens, now Mrs. Bates, was at home during the greater part of the time when her father, Mr. Pickens, reared Margaret Deyton. They attended Weaverville College together. Miss Deyton's mental condition was good after she came back from New Mexico until she died. I did not see the will or hear her mention it. I have no interest in this action. I suppose you might say that Miss Margaret Deyton and Mrs. Bates were half first cousins."

Mrs. Mamie Garrison, witness for propounders, testified: "I am the daughter of Mr. George Pickens. Mr. R. C. Pickens is my uncle. I visited at his home often. Margaret Deyton lived with my uncle, Mr. Pickens, before she went to New Mexico for her health. I saw her often. She was a great friend of mine. When she returned from New Mexico she was weak physically, but mentally she was all right. After she came back she was tired and seemed to think she would get better, and what she talked about principally was to tell about her trip to New Mexico. I never heard her say anything about the will. I went to see her on Tuesday after she came back home and left Wednesday evening."

Mrs. C. W. Bates, witness for propounders, testified: "My given name is Myrtle, and I am the daughter of Mr. and Mrs. R. C. Pickens. I knew Margaret Deyton from her babyhood. I was about nine years older than she. I am the mother of this little girl, Mary Margaret Bates. She is my oldest child. The only child I had when the will was made. She was named Mary for her grandmother and Margaret for my cousin, Margaret Deyton. I am the wife of Rev. C. W. Bates, pastor of Grace Church at Greensboro, now. When the will was executed we lived in Asheville, where he was pastor of the Asheville Methodist

Protestant Church. He was pastor of the church for five years. We went from there to Grace Church at Greensboro. I remember when Miss Deyton came back from New Mexico. My husband, Mr. Bates, went out there for her and brought her back. The body of those papers (A and B) are in my handwriting. Margaret Deyton deposited the paper-writings marked Exhibit 'A' and 'B' with Mr. Bates, and he took them. He was gone just about a week. My husband had no other purpose in going to New Mexico except to go after her. I was with my cousin Margaret almost continually up to the time she died. She died at my mother's home. Her mental condition was excellent, even to small details."

C. H. Shope, witness for propounders, testified: "I live at Weaverville, about a couple of hundred yards from Mr. R. C. Pickens' residence. I knew Miss Margaret Deyton for about ten years. She lived with Mr. Pickens. I went to see her several times after she came back from New Mexico. I do not think she lived over a week after she came back; maybe eight days. So far as I had any conversation with her, I never detected anything wrong with her mind. She was always considered a bright girl in Weaverville. I did not talk very much with her. I would go up almost every day and see her and ask her if I could do anything for her. She would always answer me intelligently. I did not allow her to talk to me much, because she was weak and it would make her cough. I am not related to any of the parties and have no interest whatever in the suit."

Mrs. Loula Gill, witness for the propounders, testified: "I am the daughter of Mr. Wesley Gill, of Weaverville, and have known Miss Margaret Deyton for about fifteen years. I lived about a mile from her. I went to see her after she came back from New Mexico. I knew her well before she became sick. When I went to see her she talked very sensibly; was in her perfectly right mind."

Mrs. Georgia Burgin, witness for propounders, was recalled and testified: "Deceased asked me to fill out some checks after she came back to pay certain bills she owed in New Mexico, and one for Mr. Bates in the sum of fifty dollars. I think she had a clear conception and understanding of her business affairs. I think the check for Mr. Bates was drawn by some one. I know he got the watch she intended for him."

Mrs. Priscilla Gale (wife of T. K. Gale), witness for the propounders, testified: "My name is Priscilla Gale, and my home is in Asheville. I am a widow, my husband being dead. My occupation is nurse. I am now engaged to nurse a patient at Tryon, N. C., and have just come from Tryon. I knew Miss Margaret Deyton; I nursed her during her last illness. She lived a week after I took charge of the case. I was with her all the time during that time. She was sane. I remember her

executing a paper-writing that she called her will. I signed each of the two as a witness. I saw Miss Margaret Deyton sign them. Mr. and Mrs. Bates, Mrs. Pickens, and Miss Annie Stepp and I were present at the time. I saw Miss Annie Stepp sign the paper-writing. I certainly was present when she dictated this paper. She said that she wanted to make her will and she asked me to get some paper so she could make her will, because, she said, she thought every one ought to make a will, and then she went ahead and made her will just like it is there."

By the court: "Who wrote it?" A. "Mrs. Bates. She asked Mrs. Bates to write it. I do not know that I remember just everything she said, but she went ahead and told what she wanted each one to have—what she wanted Mr. Pickens to have and Mrs. Pickens and Mary Margaret and Mrs. Bates; stated what she wanted each one to have. After it was written, as Miss Margaret dictated it, they read it over to her and asked her if that was all right, and she was satisfied. That was after she had dictated it and before she signed it. Mrs. Bates read it over to her, and she said it was all right, and she signed it. I signed it at her request. What appears on that card, Exhibit 'A,' was signed one day and the other was signed the next day. I think she had thought of things that perhaps she had left out of the other and wanted to be sure that it was like she wanted it before she left. When Exhibit 'B', the last one, was signed she just said she wanted her uncle to have that suit of clothes and the pastor the money. She said, 'I have left them out and I want to give that twenty-five dollars to the church.' She said, 'I have not given anything to the church this year and I want to give this,' and that was put on that. I believe Miss Annie Stepp came in to witness it. I am sure she did. I heard Miss Deyton ask Mrs. Bates to go for her to witness the will. She asked Mrs. Bates to go and get Miss Annie Stepp, and Mrs. Bates went for her. I saw her sign that. I did not notice whether Miss Annie read it. I do not believe I remember whether she read it over. Of course, I was busy. Miss Margaret lived about one week after she came back from New Mexico, and I was her nurse at the time. She was very weak when she came, but still until the last she was not so very weak. I would take her up in bed to bathe her and comb her hair; and she would sit up and make out checks. She died of tuberculosis. Of course, she gradually got weaker. She died about two or three days after she signed those cards. Mrs. Bates, Mr. Bates, Mrs. Pickens and myself were in the room when she wrote Exhibit 'A.' Miss Margaret read it over after the card was written. Mrs. Bates read it to me. Miss Margaret dictated it and read it herself. She had it in her hand. I saw her look at it as she was reading it. She signed her name. She did not have any help in signing it. She held the pencil herself, or pen. Mr. Bates, Mrs. Bates and Mrs. Pickens and myself

were present when she signed it. No one else was in the room when she signed it. After she looked it over and signed it, then Mrs. Bates read it over to me, and of course I signed it. She did not sit up when she signed it; she was lying down. I was right in the room where she was, standing right by the side of her bed. When I signed it Miss Margaret was looking at me. No one else in the room at the time."

Q. Who suggested to have another witness? A. "I don't remember who suggested that."

Q. But anyhow some one suggested it? A. "Some one suggested it, yes."

Q. Mrs. Bates wanted to have the witness? A. "Yes."

Q. How long was she gone when she went to get Miss Stepp? A. "Oh, not a minute scarcely."

"Came back with Miss Stepp and Mrs. Suttles. After Miss Stepp came in she was told about the will. I believe Mrs. Bates was talking to her and said that Margaret wanted her as a witness to sign that. She told her that Margaret and I had already signed it. Miss Stepp took the card and pencil, or pen, whatever it was she signed it with. She was standing at the foot of the bed. She was facing her and Miss Margaret was lying flat on her back. She was looking at her. I saw Miss Stepp sign, and Miss Margaret certainly was in a position to see her sign it. Miss Stepp did not see me sign it. This second card, Exhibit 'B,' Mrs. Bates wrote that. It was written in my presence and Miss Margaret signed it in my presence, and Mrs. Bates and myself, and I am not sure that Mrs. Pickens was in there or not. I do not remember. Miss Stepp was in the room. This second paper was not signed by Miss Stepp in another room entirely. Both of them were signed in Miss Margaret's presence. Miss Stepp came in after I had signed it. In both cases she was not in the room when I signed it or when Miss Margaret signed it. Mrs. Bates told Miss Annie Stepp when she came in the room that Miss Margaret wanted her to sign the will as a witness. That was within the hearing of Miss Margaret Deyton and was in the room with her. The first paper was signed the first afternoon it was made. When she remembered those things that she wanted added on to the first one that she had not put down. She had not told them those things. Those things she wanted added to it. Those are the same paper-writings and all parts of them that I signed."

Mrs. Bates, recalled: "Miss Annie Stepp was in the house at the time the will was executed. I went for her to witness it. I said to her (Miss Stepp), in the presence of Miss Margaret Deyton, 'Here is her will and she wants you to sign it.' Miss Annie signed it. She was at the table at the foot of the bed. It is a small room and there was a small table at the foot of the bed, and she signed it there in view of

Miss Margaret. Margaret was lying on her back, facing the foot. Miss Stepp was standing at her table at the foot of the bed. Mrs. Gale was in the room. Miss Annie Stepp signed the paper-writing as a witness immediately after I made that statement. That was the first paper-writing, Exhibit 'A.' The paper-writing, Exhibit 'B,' contains two items; they are in my handwriting, the main body. I do not recall whether Exhibit 'B' was signed by Miss Stepp in a different room. I know it was made in the night after the first one was made, and Miss Annie was asleep and through Margaret's thoughtfulness she was not to be wakened before morning. I really could not tell, Mr. Brown, whether it was signed in a different room."

Mrs. Annie Stepp-Suttles, a witness for the propounders, testified: "I live at Black Mountain. My name was Annie Stepp before I married Mr. Zeb Suttles. I am a cousin of Miss Margaret Deyton. I was at Mrs. Pickens' when Miss Margaret Deyton executed the paper-writing. I signed the paper identified as Exhibit 'A' as a witness. There is my signature. When I signed it I do not remember whether it had already been signed by Mrs. Gale. I also signed the paper identified as Exhibit 'B.' I signed the first paper, Exhibit 'A,' in the room where Margaret was. I signed the second paper, Exhibit 'B,' just across the hall from Margaret's room, in Mrs. Pickens' room. I do not remember whether the doors were open. I do not know that. I signed Exhibit 'A' in the room where Margaret was present and in where Margaret was sick. There were several in there at the time I signed it, but I do not remember just who they were. I did not see Miss Margaret sign her name to Exhibit 'A.' I did not see Mrs. Gale sign her name to Exhibit 'A.' Miss Margaret did not tell me that she had signed her name, or that she had made her will; she did not mention it. The only person that said anything to me about the paper-writing was Mrs. Bates. She told me to sign it; told me that she wanted me to sign it. Miss Margaret was lying on her back in bed. She could see me sign it if she had been looking. I do not know where Mrs. Gale was at the time; she could possibly have been in the room. I do not know. I was not at the house when the paper was written. When I came in Mrs. Pickens told me she was making her will. I did not go in the room, and then Mrs. Bates came and told me to come in and sign it. Mrs. Pickens is Mrs. Bates' mother. This paper, Exhibit 'B,' was signed the next morning. I do not remember what names were on the paper when I signed it. I did not see anybody sign Exhibit 'B.' Miss Margaret never told me she was making her will. I signed the second paper, 'Exhibit B,' in a different room. Miss Margaret could not have seen me sign the last one. I do not know where Mrs. Gale was at the time I signed the last one. Miss Margaret never mentioned the will to me at all; Mrs. Bates asked me to sign it.

She never requested me to sign either one of them. I did not see her sign and she did not request me to sign either one of the papers. Miss Margaret was very weak when I went into the room and signed the paper."

EXHIBIT "A."

One year's royalty from the mines to be given to Aunt Mollie.
Enough to get one South Bend watch for Bert.
Fifty dollars for Myrtle.
My watch for Mollie.
Lavalleire for Iona.
Buried with topaz.
One thousand dollars for Mary Margaret for her education, to be used only for that.
My suit and whatever clothes Mollie would like, including my coat, given to her.
All that remains over and above these foregoing bequests be given to Mollie. MARGARET DEYTON.
Witnesses:
MRS. PRISCILLA GALES.
ANNIE STEPP.
March 2, 1917.

EXHIBIT "B."

Twenty-five dollars to pastor's salary in M. P. Church, Asheville.
Nice suit of clothes for Uncle Cris. MARGARET DEYTON.
Witnesses:
MRS. PRISCILLA GALES.
ANNIE STEPP.
March 2, 1917.

Caveators requested that the jury be directed to answer the issue "No," and *Judge Justice* charged the jury as follows:

"Gentlemen, this is a matter of law, and the court will have to charge you that under the law that this testimony, this proof, does not come up to the requirements of the law, and that, therefore, this will has not been proven in accordance with the law, and the court instructs you that it is your duty to answer this issue 'No.' That is the ruling of the court. Of course, the other side can take it to the Supreme Court and have it reviewed."

Propounders duly excepted.

Judgment for caveators, and propounders appealed.

Mark W. Brown for caveators.
Wells & Swain for propounders.

WALKER, J., after stating the case: As the judge gave a peremptory instruction to the jury that the issue should be answered "No," the evidence must be taken as true and considered in the most favorable view for the propounders, and if there is any inference of fact which the jury may have drawn from it, and which would sustain the paper-writing, or either of them, as the will of the deceased, the charge was erroneous, and we are of the opinion that there was such evidence.

The legal effect of a directed verdict is the same as that of a nonsuit or dismissal under the statute (Hinsdale Act), the court does not weigh the evidence, but assumes it to be true in favor of the defeated party. Cases directly in point are *Hodges v. So. Ry. Co.*, 122 N. C., 992; *Brown v. A. C. L. R. R. Co.*, 161 N. C., 573; *Horton v. F. C. Telephone Co.*, 146 N. C., 429; *Embler v. Gloucaster Lumber Co.*, 167 N. C., 457; *Denny v. Burlington*, 155 N. C., 33; and as to effect of nonsuit in this respect, *Brittain v. Westall*, 135 N. C., 492; *Cotton v. R. R.*, 149 N. C., 227; *Deppe v. R. R.*, 152 N. C., 79; *Young v. Champion Fibre Co.*, 159 N. C., 375.

Applying this familiar rule to the evidence as it appears in the record, we conclude that there was some proof from which the jury may have correctly drawn inferences favorable to the propounders, and that it should have been referred to the jury with proper instructions on the law. We have set forth only enough of the evidence to show that there was some, at least, which favored the propounders' contention, that is, only a substantial and material part of it. We are not advised by the charge as to what was the particular and fatal defect in the proof. The testator was of sound mind, unusually bright, as said by one of the witnesses, and in full possession and use of her mental faculties. There is evidence that she had signed the papers and had them signed by one of the subscribing witnesses, and asked Mrs. Bates to call in Miss Annie Stepp to subscribe as the other witness to her will. This Mrs. Bates and Miss Stepp did, in compliance with decedent's request, and it is perfectly manifest that the latter knew the paper and its contents, and there is evidence that both witnesses signed the paper, as witnesses to it, in testator's presence and with her knowledge. The testimony of Mrs. Gale shows this to be the case, and there is more besides. The circumstances and surroundings are some evidence of it, from which the jury may reasonably infer the ultimate fact of the will's execution. It is not required that subscribing witnesses should sign in the presence of each other, *Watson v. Hinson*, 162 N. C., 72; *Collins v. Collins*, 125 N. C., 104; *Eelbeck Devisees v. Granberry*, 3 N. C., 232; Rev., sec. 3113, nor is it necessary that the will should have been attested in the same room, provided the witnesses signed it, where the testator could see them do so; that is, could see

them sign the very paper that she had signed, so as to prevent the substitution of the genuine paper for another and spurious one. It was held in *Graham v. Graham,* 32 N. C., 219: "A will is well attested by subscribing witnesses when, though not in the same room with the testator, they are in such a situation that the testator either sees or has it in his power to see that they are subscribing, as witnesses, the same paper he had signed as his will. Where the supposed testator could only see the backs of the witnesses, but not the paper they were subscribing: *Held,* that the paper-writing was not well attested as a will." See, also, *Cornelius v. Cornelius,* 52 N. C., 593; *Bynum v. Bynum,* 33 N. C., 632. "Generally the witnesses are not required to subscribe the will at the express request of the testator. He need not formally request the witness to attest his will as the request may be implied from his acts and from the circumstances attending the execution of the will. Thus a request will be implied from the testator's asking that the witness be summoned to attest the will, or by his acquiescence in a request by another that the will be signed by the witnesses." Thompson on Wills, 449; *In re Herring's Will,* 152 N. C., 258; *Burney v. Allen,* 125 N. C., 314; *In re Cherry's Will,* 164 N. C., 363. Testator must have seen the witnesses, or have been able to do so at the time of the attestation in the position he then was. *Jones v. Tuck,* 48 N. C., 202. There is another important question here which is raised by the apparently conflicting testimony of Mrs. Gale and Mrs. Annie Stepp Suttles as to where the papers were witnessed and subscribed by the latter. The law seems to be settled in this State that parties are not to be bound or concluded by the testimony of one of the subscribing witnesses, but may show the very truth of the matter by other testimony. As determined with us, the principle may be thus substantially stated and it is well supported by *Bell v. Clark,* 31 N. C., 239, in which the opinion was delivered by that eminent jurist, *Chief Justice Ruffin.* The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely upon the testimony of those witnesses. If their memory fail, so that they forget their attestation, or they be so wanting in integrity as wilfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. The leading case on this point is that of *Lowe v. Joliffe,* 1 Bl., 365, which was a remarkable one, and fully establishes this position. It has never, we believe, been questioned, but has been always spoken of with approbation. In *Jackson v. Christman,* 4 Wend., 277, it was laid down as undoubted law that if the subscribing witnesses all swear that the will was not duly executed, yet it may be supported by other witnesses or circumstances. In this Court, *Lowe v. Joliffe* has been always understood to be law.

Crowell v. Kirk, 14 N. C., 355. For although the law requires all the witnesses to be called, if within the jurisdiction, it would be most unreasonable to conclude the party calling them, as to the execution of a will, more than in respect to any other instrument. The obligee must call the subscribing witnesses to a bond, but as his testimony that it was executed does not conclusively prove it, so his denial of his attestation or of the execution by the obligor does not absolutely destroy it, but the parties may give other evidences that it was or was not duly executed. *Holloway v. Lawrence,* 8 N. C., 49; 1 Phil. Evi., 475, and the cases cited. The same reason applies to a will with even more force. And again, as was said in *Crowell v. Kirk, supra,* the subscribing witness to a will is rather the witness of the law than of the party calling him, and therefore the party is not bound to take his testimony as true, but ought to be at liberty to contradict and discredit him. It is impossible the Legislature should mean that one of the most solemn acts of a man's life should be defeated by the perjury of one man, or indeed any number of men; and much less by his defect of memory or of a discrimination to judge correctly of the party's strength of understanding. For as it is in respect of the fact of execution, so it must be in respect to the capacity of the party deceased, whether the defect be alleged to arise from insanity or the less permanent cause of intoxication. The jury are not confined to the opinions given by the subscribing witnesses on that point, nor to the facts on which they say they formed their opinions, but may take their judgment from other sources on which they rely more. The case of *Bell v. Clark, supra,* has since been approved in *Boone v. Lewis,* 103 N. C., 40, where *Justice Merrimon* said that the "grossest injustice would result if the law was otherwise." "The maker of a will," said the present Chief Justice, "can make an acknowledgment of his signature by words, and if you find there was such acknowledgment that will be sufficient acknowledgment under the law. It must also be witnessed in the presence of the party making the will, and he must either see the witnesses sign it or he must be in position to see them sign it, and to see if they are signing the paper-writing that he signed, . . . they must also sign as a witness at his request. It is not necessary, however, that he should make the request himself. If he authorizes some one else to get witnesses and ask them to sign it, then the party that he sends out will act as agent, and a request made by said person would be the request of the party signing the will." *In re Herring's Will, supra.* The material portion of the evidence bearing upon this phase of the case is as follows: "She asked us to get a paper so she could make her will. She asked Mrs. Bates to write it. Stated what she wanted each one to have. Mrs. Bates read it over to her, and she said it was all right

and signed it. I signed it at her request. I heard Miss Deyton ask Mrs. Bates to go for her (Miss Stepp) to witness the will. When I signed it Miss Margaret was looking at me. After Miss Stepp came in she was told about the will. I saw Miss Stepp sign. Miss Deyton certainly was in position to see her sign it. The second card, Exhibit 'B,' was written in my presence, and Miss Margaret signed it in my presence. Miss Stepp was in the room. This second paper was not signed by Miss Stepp in another room entirely. Both of them were signed in Miss Margaret's presence."

The other attesting witness, Mrs. Annie Stepp Suttles, notwithstanding her relation to the parties and the cause, testified: "I signed the paper identified as Exhibit 'A' as a witness. I also signed the paper identified as Exhibit 'B.' I signed the first paper, Exhibit 'A,' in the room where Margaret was. I signed the second paper, Exhibit 'B,' just across the hall from Margaret's room; in Mrs. Pickens' room. I do not remember whether the doors were open. I signed Exhibit 'A' in the room where Margaret was present. The only person that said anything to me about the paper was Mrs. Bates. She told me to sign it. Told me what she wanted me to sign. Miss Margaret was lying on her back in bed. She could see me sign if she had been looking."

The testatrix having requested Mrs. Bates to call Miss Annie Stepp as a witness to her will, and having announced to her in the presence of Miss Deyton that the latter desired her to witness her will, Miss Stepp, in the presence of Miss Deyton, and in clear view of her, signed Exhibit "A" as a witness. As to that portion of the will marked Exhibit "B," the caveator contends that it was not signed by the witness, Annie Stepp, in the presence of the testatrix, and this is the evidence of the witness Annie Stepp, but the other witness, Mrs. Gale, who was entirely disinterested and not related to any of the parties, testified that Miss Stepp signed Exhibit "B," also in the presence of the testatrix.

It was not necessary that the testatrix should have signed the paper, as her will, in the presence of the witnesses, provided she afterwards acknowledged it before them. *Burney v. Allen,* 125 N. C., 314; *Umstead v. Bowling,* 150 N. C., 507; *In re Herring's Will, supra; In re Cherry's Will,* 164 N. C., 363. The material issues in a case, raised by the pleadings, should be passed upon by a jury and not by the court, without consent of the parties. *Pasour v. Lineberger,* 90 N. C., 159; *Whitehurst v. Davis,* 3 N. C., 113; *Smith v. Campbell,* 10 N. C., 590. Where there is conflicting evidence it should be left to the jury to settle the matter by a finding under correct instructions from the court. *In re Snow's Will,* 128 N. C., 100; *In re Bowling,* 150 N. C., 507.

A will has been defined to be a disposition of property to take effect

on or after the death of the owner of it. 40 Cyc., 990; and also as the just sentence of our will touching what we would have done with our estate after death. *Payne v. Sale*. 22 N. C., 457. Exhibit "A" in this case appears to bear evidence of its disposition or character, for it expressly refers to the things given by the maker of it as her "bequests," a word appropriate to a will of property (*Smith v. Eason*, 49 N. C., 34), and it is often employed by the unskilled or unlearned to describe both kinds of property. Her intention to make it her will could fairly be inferred from the language and general appearance of the document. As to the second, Exhibit "B," it has some resemblance to a will or a part of one, was subscribed by the same witnesses, and executed on the same day as Exhibit "A." The Chief Justice says in the case of *In re Edwards*, 172 N. C., 369, 371: "No particular form of expression is necessary to constitute a legal disposition of property by will. Although apt words are not used, and the language is inartificial, the Court will give effect to it where the intent is apparent, says *Brown, J.*, in *Kerr v. Girdwood*, 138 N. C., 473; citing *Henry v. Ballard*, 4 N. C., 396, and *In re Belcher*, 66 N. C., 54, to the above purport, that, 'Form will be discarded, and has been, so that an instrument in form a deed has been held to be a will.' The subject is fully discussed with ample citation in *Morrison v. Bartlett* (Ky.), 41 L. R. A., 39. In the notes to this case are many interesting cases in which instruments in the form of a contract, acknowledgments of indebtedness, assignments, endorsements, bank deposits, commercial paper, leases, powers of attorney, orders on executors, and other informal papers are held to be sufficient as wills when the intent sufficiently appears that there is to be a disposition of the testator's property after death." *Kerr v. Girdwood*, 138 N. C., 473, cited above, is reported with notes in 107 Am. St., 551, which cite *Ferris v. Nelville*, 89 Am. St., 486, where the subject is fully discussed in a very illuminating monograph. In 40 Cyc., 1091, it is said: "It is not necessary that any particular form of words be used to make a will. Any writing to take effect at death may constitute a will." The power to devise is purely statutory (*In re Will of Garland*, 160 N. C., 555), and our statute does not require any particular form. The instruments here appear to be of a testamentary character, and if properly identified and linked together as parts of the same instrument, and legally attested, they may operate as the will of the decedent. But the facts must be found by the jury, in order that we may pass upon the validity of the paper-writings as the will of the deceased.

A careful examination of the case convinces us that there was error in virtually withdrawing the case from the jury.

New trial.

W. M. PARVIN v. BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

(Filed 27 May, 1919.)

1. **Constitutional Law— Roads and Highways— Taxation— Bonds— Special Purpose—Necessary Expense.**

   Chapter 284, Public Laws of 1917, authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of Article V, section 5, of our Constitution, and not within that of section 1 of the same article prescribing the limitation and equation between the property and the poll tax; and being for a necessary county expense, the vote of the people within the county is not required by our Constitution, Art. VII, sec. 7.

2. **Constitutional Law—Amendments—Roads and Highways—Private Laws —Statutes.**

   The restriction placed by the amendment of 1916 to our Constitution upon the General Assembly to pass local or private laws as to public highways has no application to the provisions of chapter 284, Public Laws of 1917, for the statute relates to the establishment of roads, ferries and bridges for the whole county at such places as deemed expedient by the local authorities charged with the duty of providing and supervising them, and not for the laying out or maintenance of a special road or erecting a certain bridge, etc. *Brown v. Comrs.*, 173 N. C., 589; *Mills v. Comrs.*, 175 N. C., 215, cited and distinguished.

3. **Constitutional Law— Statutes— Taxation— Special Purpose— Necessary Expense—Vote of People.**

   Chapter 284, Public Laws of 1917, is a sufficient approval by the General Assembly for the levy of a tax exceeding the constitutional limit fixed by Article V, section 1, to pay the interest on, and create a sinking fund for, bonds issued by the county for the laying out, maintenance, etc., of its public roads under the provisions of the act, though no provision for a vote of the people authorizing such levy has been made by the statute, the purpose designated being for a necessary expense within the meaning and intent of our Constitution, Art. VII, sec. 7, and not requiring it. As to whether in this case the people having voted for the bonds virtually or impliedly voted for the tax, *Quere?*

ACTION tried before *Devin, J.*, 7 May, 1919, on motion for a restraining order, in the Superior Court of BEAUFORT.

Harry McMullan for plaintiff.
Lindsay C. Warren for defendants.

WALKER, J. The facts are these: The Board of Commissioners of Beaufort County, upon petition duly filed by more than one hundred freeholders of the county, ordered an election for the people to decide the question "whether the county road commission of the said county

shall issue bonds in the sum of one million dollars for the purpose of laying out and opening, altering and improving the public roads of the county." The question was duly submitted to the people, the election duly held, and the result was that a majority of five hundred and fifty-five voted in favor of issuing the bonds. The election was held and the bonds were ordered to be issued under the provisions of Public Laws of 1917, ch. 284, which were complied with in every respect. The board of commissioners now propose and intend to levy a tax of fifty cents on the one hundred dollars in value of property and one and one-half dollars on the poll, for the purpose of paying the interest as it accrues on the bonds and of creating a sinking fund sufficient to pay the bonds at their maturity. These taxes, when added to those levied for other purposes, will far exceed the constitutional limit of taxation and the poll tax of two dollars as fixed by the Constitution, and there has been no vote of the people taken upon the levy of this tax.

The plaintiff contends that the tax will be illegal, as there is no special authority or "approval" of the General Assembly to levy it, if it is for a special purpose, and no vote of the people in favor of it. He also contends that the tax is for a general purpose and the constitutional limitation, therefore, cannot be exceeded, and he relies for his last position on the case of *Southern Ry. Co. v. Cherokee County, ante,* 86. That case is said by him to apply, because it held that the purpose for which the tax was to be levied was a general one. In that case the tax was intended to provide for past deficits in the revenues for ordinary and necessary county expenses, and fell directly within Article V, section 1, of the Constitution, prescribing the limitation and equation of taxation, and not within section 6 of that article. That a tax of the kind which is proposed to be levied by the commissioners, and the levy of which is asked to be restrained, is for a special purpose has been held in several decisions of this Court, and notably in *Broadnax v. Groom,* 64 N. C., 244, at p. 248, and also in *Herring v. Dixon,* 122 N. C., 420, where the authorities are cited at page 423. It has also been held by this Court that the laying out, constructing, and repairing roads and bridges is a necessary expense of the county not requiring a vote of the people under the Constitution, Art. VII, sec. 7, for the necessary taxation to pay the same. *McCless v. Meekins,* 117 N. C., 35; *Tate v. Comrs.,* 122 N. C., 812; *Herring v. Dixon, supra; Hargrove v. Comrs.,* 168 N. C., 626; *Moose v. Comrs.,* 172 N. C., 419. The levy of taxes in this case is for the purpose of paying the debt contracted for a necessary expense, namely, "the laying out, opening, altering or improving the public roads of Beaufort County," and therefore did not require such a vote.

There was no vote of the people in regard to the tax, but the issue

of bonds was approved by such a vote, and this course was taken by the commissioners, as they declare, under the Public Laws of 1917, ch. 284.

The question now is, whether that act is sufficient authority for the levy of the proposed tax, since the amendments of 1916 to the Constitution in regard to local, private, and special legislation were ratified and became operative. The amendment, so far as applicable to this case, provides: "The General Assembly shall not pass any local, private or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways. . . . Any local, private, or special act or resolution passed in violation of the provision of this section shall be void. . . . The General Assembly shall have power to pass general laws regulating matters set out in this section." The plaintiff does not contest the validity of the bonds, but admits that they will be valid obligations of the county, but he denies that the commissioners have any power to levy taxes to pay the interest and provide a sinking fund to take care of the principal, because, in the first place, they are to be levied for a general purpose, and secondly, because, if this is not so, and the taxes are for a special purpose, the levy will require the special approval of the General Assembly, which has not been given.

We have answered the first objection. The second is more serious in its nature, but we do not think that it is attended with any insurmountable difficulty. The constitutional amendment of 1916, concerning the laying out and construction of public roads, was evidently intended to do away with the enormous flood of bills for purely local and special relief, which could the more easily and safely be intrusted to the domestic authorities, who had better opportunity by actual observation and experience to understand and appreciate what was necessary for the welfare of their particular community. If the language of ch. 284, sec. 29, of the act of 1917, may not extend to bills for the levy of the taxes to construct a particular road, or to erect a particular bridge, or establish a particular ferry, as was held in *Brown v. Comrs.*, 173 N. C., 598, and *Mills v. Comrs.*, 175 N. C., 215, we are of the opinion that in matters relating to general county administration, such as the establishment of roads, ferries and bridges for the whole county, at such places as deemed expedient by the local authorities, who are charged with the duty of providing for such things, and having the supervision thereof, it was intended that this might be done by a general law providing for such cases which should be a sufficient approval of the General Assembly, when the limitation of taxation, as provided in the first section of Article V of the Constitution, will be exceeded. In the cases above cited there was special approval given for

opening the road in North Cove Township, McDowell County, in the first, and the same kind of approval given to the construction of the bridge over the Catawba River, between the counties of Iredell and Catawba, in the second of those cases. But the subject and purpose, of the law of 1917, ch. 284, is more general and of broader scope, as it also extends to matters concerning the general administration of county affairs in respect to establishing roads, bridges, etc.

The tax proposed to be levied by the defendants in this case applies to all the roads of the county, or to such portions thereof as those having charge of them, under the provisions of the act of 1917, may deem it expedient to open, lay out and construct. The defendants having complied with the terms of the said act, and the bonds being valid when issued, we conclude that the general law of 1917, ch. 284, is a sufficient approval of the General Assembly to authorize a levy of the tax which exceeds the constitutional limitation under Art. V, sec. 1, to pay the interest on the bonds, and to create a sinking fund for the redemption of the principal. The act of 1917 does not require a vote of the people in order to authorize the levy of the tax, and, as we have said, none was required by the Constitution, as the purpose for which the tax is to be levied is a necessary expense within the meaning and intent of Art. VII, sec. 7, of that instrument. The Legislature could have provided for such a vote, and it may have been wiser to do so, as a check or restraint upon improvident action by the local boards, but this is a matter which must be governed by its discretion, and is one of legislative policy and not of law. No vote is required to levy taxes for necessary expenses, and no other sanction except where all the taxes, including the one proposed, will exceed the limitation. The Legislature, for some reason satisfactory to itself, provided in this instance that a vote should be required for the issue of the bonds, but none for the tax.

We should consider the amendments of 1916, with the other parts of the Constitution *in pari materia,* in order to ascertain what was meant by the amendments, or we have, at least, the right to do so. The people believed that the local authorities could safely be trusted with the powers conferred with the approval of the General Assembly under a general law, and we do not see why this is not a wise conclusion. The statute is drawn with great care and precision, the only defect, if any at all, being the failure to provide for a vote of the people upon the question of levying the tax to pay for road extension and improvement, but this, as we have shown, is not a fatal omission, as the tax may be validly ordered to be levied, without this safeguard. It would seem that as the people voted for the issue of bonds, they virtually or impliedly voted for the tax, as the bonds would be of no

market value without some adequate provision for discharging the principal and interest of the debt, but this is not necessary to be decided, and is merely referred to incidentally in passing, and constitutes no part of the judgment of the Court upon the questions submitted to us.

There is another question we are requested to pass upon, as to the effect of the restriction upon taxation in the act of 1919, but it is not presented in the record, and is much too important a matter to be considered until it is so directly raised.

The questions we have decided, or some of them, were considered and passed upon at this term in the case of *Guire v. Comrs.*, from Caldwell County, *post*, 516, to which we refer.

It will be certified that there was no error in the judgment below.

Affirmed.

EULA K. AND CARRIE WILLIAMS v. CAMP MANUFACTURING COMPANY.

(Filed 27 May, 1919.)

1. Instructions—Railroads—Fires— Spark Arresters— Defects— Evidence— Prima Facie Case.

In an action to recover damages to plaintiff's land alleged to have been caused by a spark from defendant railroad company's passing locomotive emitted from a defective smokestack, or by reason of the negligent operation of the engine, it is necessary for the plaintiff to show that the fire was actually caused by a spark from the engine before any presumption of negligence arises, which would require the defendant to go forward with proof that its engine was equipped properly and was not negligently run, or take the chance of an adverse verdict. While a detached part of an instruction to the jury upon this question may be objectionable as requiring the defendant to give such evidence in explanation upon evidence merely as to the direction of the wind and the absence of other causes, etc., it will not be held as reversible error if other parts of the charge given in the same connection makes this basic finding necessary to give the plaintiff the benefit of the presumption and in such manner as that the jury could not have been misled.

2. Evidence—Railroads—Fires—Trials—Questions for Jury.

Upon the trial of this action to recover damages of a railroad company for setting fire to plaintiff's timber, there was some evidence tending to show that the fire was caused by sparks from the smokestack of defendant's locomotive by reason of defects therein, and evidence to the contrary: *Held*, the cause was properly submitted to the jury, and that the testimony of a witness in the case as to seeing sparks thrown from this smokestack was sufficiently proximate in point of time to be admitted as additional evidence of the smokestack being defective.

ACTION tried before *Guion, J.*, and a jury at January Term, 1919, of DUPLIN.

Plaintiffs sued for damage which they alleged was caused by defendant's negligence in burning their timber. It appears that the defendant was operating a locomotive engine on its railway about sixty-five or seventy yards from the place where the fire started, which was on the edge of a branch. The engine was pushing back twenty or twenty-five empty log-cars to Harvell switch, and the smoke from the fire was first discovered about forty-five minutes or one hour after the engine had passed the point on the railway opposite the place of the fire on plaintiffs' land. There was evidence that the smokestack of the engine was defective, some of the asbestos packing was missing. The witness, A. B. Sykes, described the engine and its stack as follows: "We had a 1910 Baldwin engine with a wood-burning stack on it, a cone in her clamp-down and net in the stack. Was equipped as wood burner. We were burning wood and coal mixed and box-faced lightwood that morning. Was not equipped with coal spark-arrester. Stack was about four feet high, I think. Same stack as was on engine the first time I ever saw it. Examined stack; part of it was so sparks could not pass through or out of it. Was not made solid. They have some with solid tops and some with bolts, and you have to put packing in the latter, where they are bolted. This stack was bolted around top, and we packed it with asbestos or something like that to keep the sparks from going out of joints best we could. Some time after that, within two weeks I think, we took stack down, went in it and looked at it, and my remembrance is that we found on one side where this packing was blown out, and Lamb English cut a piece and put in there and clamped it down. We found a little hole in the side of the stack, just below where packing is, where the stack curves, there is a little hole in the stack. Suppose hole is three-fourths of an inch long, and you could stick a match in it, I suppose." He also said the road is level towards Harvell Switch, except for a little rise occasionally, and there is not much grade. "There was no sign of fire between railroad and the run of the branch where the smoke came from," said the witness, "but the wind was blowing in the direction of the fire from the engine, and there was no fire at the place near the branch when the engine passed on its way to the switch." Verdict and judgment for the plaintiff, and defendant appealed.

George R. Ward and Ward & Ward for plaintiff.
Stevens & Beasley for defendant.

WALKER, J., after stating the case: The court charged the jury, among other things, as follows: "You have the right to consider, in

passing upon the evidence that has been offered to you, in order to show you that this engine was the origin of the fire, the fact that there was no fire at that place when the engine passed; that the wind was blowing in the direction of the place at which the fire occurred, if you find those facts from the evidence and if you do so find, then the law presumes or makes what is known as a *prima facie* case, entitling Mr. Williams to ask at your hands your answer to that issue, because if you shall have found from those facts that a spark came from the engine of the defendant, the Camp Mfg. Company, and set fire to the woods, the law would presume, unexplained, that the engine was negligently operated, or that it wasn't fitted with proper appliances in good condition, or operated by a skillful engineer in a careful manner." Defendant excepted. This instruction may properly be subject to the criticism of the defendant, as not being very clear, but it is not so erroneous as to be fatal to the verdict, for if construed as a whole and in the connection where we find it, we do not think that an intelligent jury could have been misled by it. They would naturally and reasonably conclude that the fact to be found, in order to constitute a *prima facie* case of negligence, arising either from a defective condition of the engine or its improper and careless operation, was that the engine had emitted the spark which caused the fire. If this fact had been found by the jury from the evidence, to which the judge referred, it would carry the case to the jury, and it would then devolve upon the defendant to show that the engine was in proper condition, and had been carefully handled, or in default of doing so, to take the risk of an adverse verdict. In other words, the fact that a spark from the engine caused the fire, whether on or off the right of way, is evidence of negligence though not conclusive, and may warrant a verdict of negligence, in the absence of explanatory proof, so that it behooves the defendant to go forward and offer exculpatory evidence unless there are circumstances appearing in the plaintiff's own evidence upon which he may rely to show care on his part. The nature of such proof as makes a *prima facie* case of negligence is discussed in *Stewart v. Carpet Co.,* 138 N. C., 60, which is cited with approval in *Sweeny v. Erving,* 228 U. S., 233, where the Court, speaking through *Justice Pitney,* of the *maxim res ipsa loquitur,* says: "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient, that they call for explanatory or rebuttal evidence, not necessarily that they require it; that they make a case to be decided by

the jury, nor that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions." The casting of sparks from a locomotive engine upon another's land and burning the timber on it, is a striking illustration of this doctrine, and the rule we have mentioned applies strictly to such a case. There are many cases decided by this Court in which it has been applied. *Williams v. R. R.,* 140 N. C., 623; *Craft v. Timber Co.,* 132 N. C., 151; *Knott v. R. R.,* 142 N. C., 238; *Cox v. R. R.,* 149 N. C., 117; *Deppe v. R. R.,* 152 N. C., 79; *Kornegay v. R. R.,* 154 N. C., 389; *Currie v. R. R.,* 156 N. C., 419; *Hardy v. Lumber Co.,* 160 N. C., 113; *Aman v. Lumber Co., ibid.,* 370, and the recent case of *Perry v. Mfg. Co.,* 176 N. C., 68, in which the Court held, as will appear from the statement of the case and the opinion, that it was the *fact itself,* that a spark from the defendant's engine *caused* the fire, which made out a *prima facie* case of negligence and not merely the evidence of the fact, as stated inadvertently in one part of the printed report of the case. That discrepancy in what may have caused the judge, who presided at the trial, to adopt the particular form of his instruction, though afterwards, and in the same connection, he pointedly told the jury what is the correct rule of law. If the two propositions, which he stated in his instruction, were not so closely and intimately connected as to fully explain each other, and thereby prevent any misunderstanding by the jury, we would reverse for error, but we cannot well see how they were misled as we must presume that they were men of at least ordinary intelligence. We call special attention to this matter, as the rule should be clearly defined and understood so that there will be no misapprehension of it in its practical application. The instruction, reasonably construed, means that if the jury found from the facts recited by the judge the main fact that the engine sparks started the fire, a *prima facie* case was presented, calling upon defendant to go forward with his proof or take the risk before the jury of an adverse verdict.

There was evidence given for the defendant which conflicted with that introduced by the plaintiff, but the jury alone could settle this conflict, and while the plaintiff did not make out a strong case, but rather a weak one, when we review all of the facts in concourse, we cannot withdraw the case from the jury, who are the triers of the facts, if there is any evidence reasonably tending to support the plaintiff's allegations. *Wittkowsky v. Wasson,* 71 N. C., 451; *Byrd v. Express Co.,* 139 N. C., 273, and cases cited. The case of *Broadfoot v. R. R.,*

174 N. C., 410, it seems is directly in point as justifying the submission of this case to the jury, the facts being substantially alike. See, also, *McMillan v. R. R.*, 126 N. C., 725; *McRainey v. R. R.*, 168 N. C., 571; *Deppe v. R. R.*, 152 N. C., 82.

The statement of the witness as to the dropping of sparks by this engine placed the event sufficiently proximate to the time when the fire started for it to be competent as additional evidence of its defective condition. *Knott v. R. R.*, 142 N. C., 238; *Whitehurst v. R. R.*, 146 N. C., 591; *Kerner v. R. R.*, 170 N. C., 94; *Meares v. Lumber Co.*, 172 N. C., 289; *Broadfoot v. R. R., supra; Deppe v. R. R., supra.*

We are of the opinion that the other criticisms of the charge of the court and its rulings are without any substantial merit.

It will be certified, therefore, that there is no error in the case.

No error.

V. D. GUIRE v. THE BOARD OF COMMISSIONERS OF CALDWELL COUNTY.

(Filed 27 May, 1919.)

1. **Constitutional Law— Counties— Highways— Necessary Expenses — Taxation—Limitation—Statutes.**

Debts contracted by the county for building and maintaining its highways are for necessary expenses, not requiring legislative sanction under Article VII, section 7, of our Constitution, when not exceeding the limitation of Article V, section 1, to pay the interest on the debt or provide a sinking fund for the payment of the principal; but where this limitation is exceeded the approval by legislative enactment is required, the statute determining the right of issuance with or without the vote of the people, a requirement that it should be so submitted being a statutory restriction, the constitutionality of the act depending upon whether the bill passed each branch of legislation on three several days, with the "aye" and "no" vote entered on the journals on the second and third readings. Const., Art. II, sec. 14.

2. **Constitutional Law — Taxation — Statutes — Amendments — Material Changes—Bonds—"Aye" and "No" Vote.**

An amendment to an act authorizing a county to issue bonds for road construction and maintenance, which increases the rate of interest from 5 per cent, authorized by a former statute, to 6 per cent, is to effect a material change in the former law and requires, for its validity, that in its passage it should have been read on separate days, with the "aye" and "no" vote taken, entered on the journals, etc., as required by Article II, section 14, of our Constitution, this rule applying with greater force when the amendment is by separate act.

3. Same—Legislative Approval.

Where a valid statute authorizes a county to issue bonds for a necessary expense, with the approval of the voters, in excess of the limitation on taxation prescribed by Article V, sec. 1, of the Constitution, with further authority to again submit the question if at first defeated, bonds issued pursuant to a later amendment materially changing the statute and which has not met the constitutional requirement as to its several readings, "aye" and "no" vote, etc., Article I, section 14, are invalid for the lack of the required legislative authority, though the approval of the voters had been obtained as authorized by the former act, but for the increased interest rate.

4. Statutes—Counties—Bonds—"New Registration."

The provisions of a statute authorizing a county to issue bonds for highway purposes, with the approval of its voters, that "no new registration shall be required," is not a prohibition on the power of the county to order a new registration, but a statement that it shall not be necessary.

APPEAL by plaintiff from *Long, J.*, at the May Term, 1919, of CALDWELL.

This is an action to restrain the issue of road bonds under the authority of chapter 67 of the Public-Local Laws of 1917, as amended by chapter 453 of the Public-Local Laws of the same year and by an act ratified 10 March, 1919.

The first act authorizes the issue of bonds for road purposes in Caldwell County in the sum of $250,000, bearing interest at not exceeding 5 per cent and to run not more than forty years.

It was also provided in the act that it should not be operative unless approved by the voters at an election to be held under the act, but that if it should not be approved at a first election that a second election might be held, but that no new registration should be required for such second election.

An election was held under this act on 8 May, 1917, and a majority of the votes cast was against the issue of the bond.

On 10 March, 1919, the General Assembly amended the act of 1917 by changing the rate of interest from 5 per cent to 6 per cent, and this last act was not passed as required by Art. II, sec. 14, of the Constitution.

An election was thereafter held in May, 1919, on the question of issuing bonds at a rate not exceeding 6 per cent per annum, and at said election a majority of the votes cast was in favor of the issue of the bonds. A new registration was ordered for this last election.

The plaintiff contends:

1. That the defendant has no authority to issue said bonds because the amendment of 1919 was material, and it was not passed as required by the Constitution.

2. That the defendant had no right to order a new registration for the second election and that therefore the second election was irregular and void.

His Honor held that the defendant had power and authority to issue said bonds and refused to grant the restraining order, and from the judgment entered accordingly, the plaintiff appealed.

J. T. Pritchett attorney for plaintiff.
Mark Squires attorney for defendant.

ALLEN, J. The following principles, germane to the present controversy, are established by the authorities:

1. Debts contracted for building and maintaining roads are for necessary expenses. *Hargrove v. Comrs.,* 168 N. C., 626.

2. The county may contract a valid debt for necessary expenses without a vote of the people and without legislative sanction under Art. VII, section 7, of the Constitution, but it cannot exceed the limitation on taxation prescribed in Art. V, sec. 1, to pay the interest on a debt *so contracted* or to provide a sinking fund for the payment of the principal. *Herring v. Dixon,* 122 N. C., 424.

3. The county may contract a debt and exceed the limitation on taxation for necessary expenses with the approval of the General Assembly, with or without a vote of the people, as the General Assembly may determine. *Pritchard v. Comrs.,* 160 N. C., 477.

4. When the General Assembly requires the question of incurring the debt to be submitted to a vote this amounts to a statutory restriction, and when acting under the statute, the indebtedness cannot be incurred unless approved by the votes according to the provisions of the statute. *Comrs. v. Webb,* 148 N. C., 123.

5. Acts of the General Assembly authorizing a county to contract a debt for necessary expenses and to levy taxes to pay interest thereon must be enacted in accordance with the provisions of Art. II, sec. 14, of the Constitution, requiring the bill to pass each House on three several days and the ayes and noes to be entered on the Journals on the second and third readings. *Cottrell v. Lenoir,* 173 N. C., 145.

6. If in the enactment of the statute a material amendment is adopted "the required readings and entries on the Journal shall be taken anew on the bill as amended" (*Claywell v. Comrs.,* 173 N. C., 657), and this rule applies with greater force when the amendment is by separate act.

Applying these principles to the facts the defendant is without authority to issue the bonds for roads, if the amendment of 1919 is material, as it appears from the record that the act of 1917 provides for an election before issuing bonds, and that the act shall not be

operative if a majority of the votes cast at the election shall be against road improvements, which was the result of the first election, and the amendatory act of 1919, under which the second election was held, was not passed as required by Art. II, sec. 14, of the Constitution, and the materiality of the amendment cannot be questioned when it is kept in mind that it increases by 1 per cent the interest on a bond issue of $250,000, running for forty years, thereby increasing the interest and taxes each year $2,500, or for the forty years $100,000.

The cases dealing with the materiality of amendments, discussed in connection with the constitutional requirement, are *Glenn v. Wray,* 126 N. C., 730; *Brown v. Stewart.* 134 N. C., 357; *Comrs. v. Stafford,* 138 N. C., 453; *Bank v. Lacey,* 151 N. C., 4; *Russell v. Troy,* 159 N. C., 366; *Gregg v. Comrs.,* 162 N. C., 484; *Brown v. Comrs.,* 173 N. C., 599; *Claywell v. Comrs.,* 173 N. C., 659; *Wagstaff v. Commission,* 174 N. C., 380, in several of which, following *Brown v. Stewart,* the rule is stated negatively as follows: "We can see no reason why the amendment, imposing no tax, creating no debt nor increasing the amount of the bonds or the rate of the interest thereon, could not be adopted by the Senate and incorporated into the original bill on and before its second reading."

The case of *Pritchard v. Comrs.,* 159 N. C., 636, on which the defendant relies, was correctly decided, and when considered in connection with the record and the opinion in the same case, 160 N. C., 476, is in perfect harmony with the other authorities.

In that case the commissioners proposed to issue bonds for roads, as stated in their order "under authority contained in sec. 6 of ch. 600, Public-Local Laws 1911, *as well as under authority from the Constitution and laws of North Carolina,*" and it was held when the appeal was first considered that the commissioners could issue the bonds, which would be valid obligations, under authority of the Constitution, Art. VII, sec. 7, and at the second hearing that they could not exceed the constitutional limit on taxation for the payment of interest, etc., except with the approval of the General Assembly.

The objection of the plaintiff to the regularity of the election, because a new registration was ordered, is without merit. The provision in the statute "but no new registration shall be required" is not a prohibition on the power to order a new registration but a statement that it shall not be necessary.

On the facts admitted we cannot sustain the issue of bonds.

Reversed.

A. T. DORSEY v. J. W. KIRKLAND.

(Filed 27 May, 1919.)

1. **Process—Summons—Term—Statutes.**

A summons in an action is valid though issued during a term of court, under Revisal, secs. 434 *et seq.*

2. **Deeds and Conveyances—Contracts—Consideration—Agreement to Buy—Flumes.**

A deed to the right to construct and maintain a flume over the grantor's land is upon a sufficient consideration when made for one dollar and the purchase by the grantee of all wood pulp and acid wood, at three dollars per cord, the grantor would deliver, during its operation, within fifteen feet of the flume.

3. **Appeal and Error—Record—Deeds and Conveyances—Probate.**

The Supreme Court will not pass upon the sufficiency of the probate to a deed, under the requirement of Revisal, sec. 998, the validity of which is called in question, when it has not been made to appear in the record on appeal.

4. **Husband and Wife — Estates — Entireties — Common Law — Husband's Rights—Statutes—Mortgages—Leases—Deeds and Conveyances.**

The common-law doctrine of survivorship between husband and wife, where lands have been devised to them in entireties, has not been changed by statute and applies in the courts of this State, and thereunder the husband has the right of possession and management and to mortgage or lease the same to the extent that he may not impair the wife's title when or in the event she survives him. Therefore a deed by the husband of the right to construct and maintain a flume across the lands for the grantee's purpose of floating logs until a certain plot of timber had been cut by him or removed from lands beyond is valid and enforcible during its continuance without the joinder of the wife, who, with the husband, is still alive.

APPEAL by defendant from *McElroy, J.*, 8 April, 1919, from SWAIN.

This is an action to perpetually enjoin the defendant from interfering with the operation of plaintiff's flume, which extended for about fifty feet across defendant's land.

Plaintiff secured a temporary injunction from Judge McElroy, and upon the hearing upon the notice to show cause why the injunction should not be continued to the hearing, the said temporary order was continued to the hearing and the facts found by his Honor. Defendant thereupon excepted and appealed to the Supreme Court.

In the year 1915 the plaintiff, A. T. Dorsey, purchased a tract of timber land, containing about 1,700 acres, situated on Chambers Creek in Swain County, and lying from three to six miles from the nearest railroad point, for the purpose of conducting a lumbering operation. Immediately after the purchase of the tract the plaintiff negotiated with the several landowners holding property between the tract pur-

chased and the railroad for the purchase of a right of way extending from said timber tract to the railroad, as a location for a flume line over which to transport his lumber, pulp and acid wood to the railroad for shipment.

In August, 1915, plaintiff purchased from J. W. Kirkland, defendant, and his wife a right of way over two small tracts of land owned by them for the consideration of one ($1) dollar, and the further consideration that the plaintiff would purchase their pulp and acid wood placed on the flume line at $3 per cord.

At the time this deed was executed it was not acknowledged or placed to record, but was delivered to the plaintiff, who kept it among his papers until after the institution of this action. On 15 March, 1919, the plaintiff procured said conveyance to be proven upon the oath and examination of George Chambers, as to the signature of defendant J. W. Kirkland, and said paper was thereupon registered on 17 March, 1919.

Immediately after securing said deed, in the year 1915, plaintiff constructed a flume over said land and has been, ever since said date, continuously using the same for the purpose of transporting his lumber and other timber products from his mills to the railroad, without objection or complaint of defendant or his wife.

At the date of the institution of this action the plaintiff was conducting said lumbering operation, and that said operation will continue for a space of about two years before all of the plaintiff's timber is removed. The plaintiff's flume is about five miles in length and the portion of said flume upon defendant's land is a stretch of not more than fifty feet across the corner of said tracts.

Just prior to the institution of this action the plaintiff procured a warrant to be issued against the defendant Kirkland charging him with larceny of lumber from said flume as same was being transported across his land, the defendant being bound to court thereon, and thereafter the portion of the flume crossing the defendant's land fell down, and when plaintiff's hands undertook to repair same they were met by the defendant, who forbid them to go upon the property, and the plaintiff instituted this action.

The defendant acquired title to one of the tracts of land on which the flume is located under a deed which conveyed the land to the defendant and his wife, both of whom are now living, and the deed to the plaintiff, conveying the right of way, was executed by the husband alone, and contains this provision:

"It is further understood and agreed and is a part of this conveyance that the said strip or parcel of land herein conveyed shall revert back and become the property of the parties of the first part, their heirs and

assigns, without reconveyance whenever the said party of the second part shall cease to use the same for flume line purposes, and such failure shall extend for a period of twelve consecutive months."

The defendant contends:

1. That the action ought to be dismissed because the summons was issued during a term of court.

2. That there is no consideration to support the deed under which the plaintiff claims.

3. That the deed to plaintiff was improperly probated and ought not to have been admitted in evidence.

4. That the right of way could not be acquired except by deed, and as the defendant and his wife held an estate by entireties, the deed of the husband alone to the plaintiff passed nothing.

S. W. Black attorney for plaintiff.
Frye & Frye attorneys for defendant.

ALLEN, J. The first three objections of the defendant may be disposed of with but little discussion. There is no limitation in the statutes as to the time of issuing a summons, and there is no analogy between the performance of this duty and the *taking* of a deposition, as the defendant contends, which cannot be taken except by consent, during a term for the trial of the action, because the party cannot be before the court and the commissioner at the same time. The summons may issue at any time, but the return day is dependent on the time of service. Rev., sec. 434 *et seq.*

The deed appears on its face to have been made on a valuable consideration as it recites as a part of the consideration the agreement on the part of the plaintiff to purchase all the pulp and acid wood the defendant would deliver within fifteen feet of the flume at $3 per cord, and the record shows that the plaintiff has not only performed his agreement, but has gone further and has paid the defendant as much as $6 per cord. *Institute v. Mebane,* 165 N. C., 650.

The probate of the deed to the plaintiff is not in the record, and as it is not before us we cannot pass on its sufficiency, but if it is correctly copied in the plaintiff's brief, which we do not understand the defendant to deny, it conforms to the requirements of the Rev., sec. 998.

This brings us to the principal question debated by counsel, and that is as to the legal effect of the deed of the husband without the joinder of the wife.

The deed, under which the defendant claims, having been made to him and his wife, they took an estate by entirety, which carried with it the right of survivorship, and neither acting alone could by deed

destroy this right or affect the estate of the other (*Freeman v. Belfer,* 173 N. C., 581), but while this is so, during the joint lives of the husband and wife, the husband is entitled to the control and use of the land as his own property.

In *West v. R. R.*, 140 N. C., 620, *Chief Justice,* delivering the opinion, quotes with approval from 15 A. & E. Ency., 849, as follows:

"But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to effect the right of the survivor, yet subject to this limitation the husband has the right in it, which is incident to his own property. He is entitled during the coverture to the full control and usufruct of the land to the exclusion of the wife."

In *Bynum v. Wicker,* 141 N. C., 96, a mortgage executed by the husband alone was sustained, the Court saying, "This estate by entirety is an anomaly and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many States. This not having been done, it still possesses here the same properties and incidents as at common law. *Long v. Barnes,* 87 N. C., 333. At common law, 'the fruits accruing during their joint lives would belong to the husband' (*Simonton v. Cornelius,* 98 N. C., 437), hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits; but neither could encumber it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired," and in *Greenville v. Gornto,* 161 N. C., 342, a lease for ten years made by the husband was held to be valid, and the Court said of the nature of the estate and the rights and powers of the husband during the life of the wife:

"As Brady and his wife held, not as tenants in common or joint tenants, but by entireties, their rights must be determined by the rules of the common law, according to which the possession of the property during their joint lives rests in the husband, as it does when the wife is *sole seized.* Neither can convey during their joint lives so as to bind the other or defeat the right of the survivor to the whole estate.

"Subject to the limitation above named, the husband has the same rights in it which are incident to his own property.

"By the overwhelming weight of authority the husband has the right to lease the property so conveyed to him and his wife, which lease will be good against the wife during coverture and will fail only in the event of her surviving him."

If, as appears from these authorities, the husband has the control and use of the property during the life of his wife, and may deal with it as his own, and if he may execute a valid mortgage or a lease for

ten years, we see no reason for refusing to uphold his deed, subject to the limitation that all rights thereunder will cease upon his dying before his wife.

Affirmed.

R. M. SUTTON COMPANY ET AL. v. M. M. WELLS, MAGGIE R. TREADWAY ET AL.

(Filed 27 May, 1919.)

1. Fraudulent Conveyances — Deeds and Conveyances — Debts — Creditor's Bill.

A gift of lands cannot be set aside by subsequent creditors of the donor on the ground that he had not retained property amply sufficient to pay his debts, unless the existence of an unpaid debt is shown at the time of the execution of the conveyance.

2. Same—Mortgages—Equity—Purchase by Mortgagee—Execution.

Where a trustee in a deed of trust for the benefit of creditors has settled all claims against the estate, and under the direction of the trustor has conveyed his lands to a third person as security for a debt then incurred, and thereafter a settlement is made upon the payment of certain moneys to the trustor and an exchange of lands, and thereafter the trustor again failed in business and made an assignment: *Held*, the later transaction closed the relation of mortgagor and mortgagee theretofore existing, and therefore there was no existing equity of the donor which his later creditors could subject to the payment of their debts, there being no creditor to satisfy at the time of the execution of the second deed which satisfied the mortgage.

3. Same—Exchange of Lands.

A transaction between a mortgagor and mortgagee, wherein the latter afterwards acquires the equity in consideration of an exchange of lands and money paid, will not be set aside in a creditor's suit, the supervision of equity being to prevent fraud and oppression, where the credits were made after the cessation of the mortgage relation, and it is not shown that any prior creditor was complaining or existed, and the right claimed to follow the funds in the exchange of the lands will be denied.

APPEAL by plaintiffs from *McElroy, J.*, at the January Term, 1919, of HAYWOOD.

This is an action brought by the creditors of M. M. Wells, in the nature of a creditor's bill, against the said M. M. Wells, Maggie R. Treadway and husband, J. R. Treadway, and C. T. Wells to recover judgment against the said M. M. Wells for amounts due each creditor, respectively, and to set aside a deed as fraudulent executed by C. T. Wells and wife to Maggie R. Treadway, at the instance of M. M. Wells, and to have Maggie R. Treadway declared a trustee, holding the land

described in said deed in trust for M. M. Wells, who died intestate since the commencement of the action, and his death having been suggested, his heirs and administrator were made parties by order of court.

On 27 August, 1903, the intestate, M. M. Wells, was owner of a one-half acre of improved land in the town of Canton, referred to as *tract one,* and being heavily involved, made a conveyance thereof and a bill of sale of certain merchandise to R. Winfield "to be used in settling with, paying off, and satisfying" the creditors of intestate. Winfield "settled with and paid off the creditors" of intestate, receiving the merchandise as the consideration therefor, and by direction of intestate conveyed the land (*tract one*) to intestate's sister, Maggie R. Treadway, on 30 September, 1903, as security for moneys advanced and to be advanced by her to intestate, and the relation of mortgagor and mortgagee was thereby created between intestate and Mrs. Treadway. This relation continued from 30 September, 1903, until 1 September, 1914, when intestate and Mrs. Treadway jointly conveyed the land to C. T. Wells and wife in consideration of a house and lot in Canton known as *tract two* and the sum of $5,000 in money and the half-interest of C. T. Wells in a stock of merchandise, and C. T. Wells thereupon executed the deed for "Tract Two" to Mrs. Treadway, and intestate received the $5,000 and the merchandise.

This stock of merchandise was in the buildings of *tract two,* and J. R. Treadway, the husband of Maggie R. Treadway, was the owner of the other half-interest. The business was conducted by intestate and J. R. Treadway for some time, and intestate then purchased the interest of J. R. Treadway and became the sole owner. The intestate took charge of the stock of goods and rented the upstairs of the building to J. R. Price, except one room which he retained for himself, and remained in possession until he made an assignment on 20 September, 1915. *Tract two* was listed for taxes in May, 1915, by and in the name of intestate, and intestate paid the State and county taxes for that year, but the town taxes were paid by Mrs. Treadway after the death of intestate. The intestate died on 16 December, 1915. *It was admitted that intestate was not indebted to any person at the time "Tract One" was conveyed by Winfield to Mrs. Treadway, and that intestate was not indebted at the time "Tract Two" was conveyed by C. T. Wells to Mrs. Treadway.*

"After the trial had commenced and the pleadings had been read, counsel for the plaintiffs stated to the court that at the time of the conveyance of the land in controversy by C. T. Wells to Maggie R. Treadway, the intestate, M. M. Wells, was not indebted and that the plaintiffs were unable to produce any written evidence that said Maggie R. Treadway was holding the legal title to said land in trust for said M. M. Wells. Thereupon the court stated that he was of the opinion that the

plaintiffs would first have to lay a foundation for the admission of evidence of transactions between said Maggie R. Treadway and M. M. Wells prior to the execution of said deed by showing that the conveyance was made by C. T. Wells to Maggie R. Treadway with actual intent on the part of said M. M. Wells to defraud future creditors, and that said Maggie R. Treadway was a party to said fraudulent arrangement and understanding."

The plaintiffs offered other testimony tending to show that Mrs. Treadway was not the owner of "Tract One," consisting of declarations and acts of ownership on the part of the intestate, including his statement that the absolute conveyance by Winfield to Wells was in fact a mortgage, but his Honor excluded the testimony, his ruling being as follows:

"It appearing to the court from the allegations of the complaint and the admissions in the answer that the conveyance of Tract No. 1 by Mrs. Treadway and husband and M. M. Wells to C. T. Wells on 1 September, 1914, eliminated the trust established theretofore created and existing by virtue of the deed from M. M. Wells to Winfield, and from Winfield to Mrs. Treadway, and that at the time of the conveyance of the property by Mrs. Treadway and husband and M. M. Wells to C. T. Wells on 1 September, 1914, that there is no contention that the said M. M. Wells was indebted to the plaintiffs or to any one else; all evidence bearing on the question of the trust estate created and existing prior to 1 September, 1914, is excluded by the court."

The plaintiffs contend:

1. That the deeds of 1903 and 1914 to Maggie R. Treadway were without consideration, and are fraudulent and void as to the plaintiffs, creditors of M. M. Wells.

2. That whether upon a valuable consideration or not the deed of 1903 was executed as a security for debt, that this established the relation of mortgagor and mortgagee, and as the land in the deed of 1903 was exchanged for the land in the deed of 1914, the same relation exists as to the last tract of land, and that therefore Maggie R. Treadway holds an interest in said land, the equity of redemption, in trust for M. M. Wells, and that this can be subjected to the payment of the plaintiffs' debts.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

J. T. Horney, W. J. Hannah, and Morgan & Ward attorneys for plaintiffs.

J. Scroop Styles, Smathers & Clark, Felix E. Alley, and Mark W. Brown attorneys for defendants.

ALLEN, J. The first position of the plaintiffs cannot be sustained because they are subsequent creditors, and they admit that M. M. Wells owed nothing at the time of the execution of the deeds they seek to attack, the controlling principle being stated in *Aman v. Walker,* 165 N. C., 227, as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally."

The second position is upon the ground that the deed of 1903, although absolute in form, was intended as a security for debt, and established the relation of mortgagor and mortgagee, and that from this relationship a presumption of fraud arises as to dealings between the mortgagor and mortgagee, and casts the burden on the mortgagee to show that the transaction was fair and free from fraud, undue influences or oppression, and the burden being on the defendants, it was error to enter judgment of nonsuit.

The principle contended for is well supported by authority (*Pritchard v. Smith,* 160 N. C., 84; *Alford v. Moore,* 161 N. C., 386), and has been rigidly enforced, but it has no application on the admitted facts, for the reason that the trust relation was closed by the execution of deeds between the parties in 1914, before the debts due the plaintiffs came into existence, and no one who then had any interest in the property is complaining.

"It is a rule of equity not to allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan,* for the absolute purchase of the estates for a specific sum, in case of default made in the payment of the mortgage money at the appointed time, justly considering it would throw open a wide door to oppression and enable the creditors to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specified time. But even in equity, the mortgagee at a subsequent time may purchase the equity of redemption as well as a stranger, for then the mortgagor is not so much in his power, as he may himself redeem the mortgage or sell the estates mortgaged to another person, and raise the money and discharge the mortgage." *Shelton v. Hampton,* 28 N. C., 218.

The mortgagee having this right to buy the equity of redemption, subject to the supervision of a court of equity, exercised to prevent fraud and oppression, and no one having any interest in the property or the right to follow its proceeds at the time of the execution of the deed in 1914 raising any objection, the relation of mortgagor and

mortgagee was then closed by the deeds then executed, and the plaintiffs, whose debts were thereafter contracted, have no right to complain.

Affirmed.

JOE NEWTON v. F. R. SEELEY AND MARYLAND CASUALTY COMPANY.

(Filed 27 May, 1919.)

Indemnity— Contracts— Master and Servant— Employer and Employee— Bonds—Actions—Sequestration—Equity—Loss—Judgments.

An employee has no right of action upon an indemnifying contract taken out by his employer for the latter's sole benefit and to protect him alone from loss or damages to his employees caused by accidents received by them in the course of their employment; and where the assured employer has become insolvent and has left the State the policy is not subject to the equitable principle of sequestration in the employee's action, unless the plaintiff has obtained a judgment against the assured to the extent of his unpaid claim or has acquired a contractual right against the indemnitor by assignment of the policy or otherwise. *Clark v. Bonsal*, 157 N. C., 270; *Hensley v. Furniture Co.*, 164 N. C., 148, cited, approved and applied. The assured (employer) must actually sustain a loss before an action will lie upon the indemnifying policy, as this is expressly required by its terms.

ACTION tried before *McElroy, J.*, on demurrer, at March Term, 1919, of CHEROKEE.

The plaintiff, who was employed by defendant F. R. Seeley, alleges that he was injured by the negligence of his employer, as set forth in the complaint. The negligence, as alleged, consisted in the failure to prop or secure in some way the sides of the cut or pit, at the bottom of which the plaintiff was digging for iron ore, which caused the side wall of the pit to cave in and injure the plaintiff.

Defendant Seeley was insured by the defendant Maryland Casualty Company, and by the terms of the policy it was agreed to indemnify the assured against loss from the liability imposed by law upon it for damages on account of bodily injuries accidentally suffered by any employee, etc.

The casualty company was made a party as a defendant with Seeley, and the complaint alleges that Seeley is insolvent, has left the State, has no property therein, and by reason thereof the plaintiff is entitled to make the casualty company a party defendant; that the contract of insurance constitutes an equitable asset of Seeley, which by an order of the court should be sequestered and applied to the satisfaction of the plaintiff's demands against him.

The casualty company demurred to the complaint, and from an order overruling it this appeal is prosecuted.

Witherspoon & Witherspoon for plaintiff.

Merrimon, Adams & Johnston for defendant Maryland Casualty Company.

WALKER, J., after stating the facts: This case is clearly governed by *Clark v. Bonsal,* 157 N. C., 270, and *Hensley v. Furniture Co.,* 164 N. C., 148, which were actions upon identical policies issued by the same company. In *Clark v. Bonsal, supra, Justice Hoke* says: "The courts, in construing contracts of this character, have generally held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured till some damage has been sustained, either by payment of the whole sum or some part of an employee's claim; but if the stipulation is in effect one indemnifying against liability, a right of action accrues when the injury occurs, or, in some instances, when the amount and rightfulness of the claim have been established by judgment of some court having jurisdiction—this according to the terms of the policy; but unless the contract expressly provides that it is taken out for the benefit of the injured employees and the payment of recoveries by them, none of the cases holds that an injured employee may, in the first instance, proceed directly against the insurance company." He then adds, that in all the cases upon the subject, so far as examined, a right of action arising on the policy is treated and dealt with as an asset of the insured employer, and in the absence of an assignment from him, the employee cannot appropriate it to his claim except by attachment or by a bill in the nature of an equitable *fieri facias,* or some action in the nature of final process, incident to bankruptcy or insolvency, to subject the "right of action" to the payment of the plaintiff's claim.

We presume, and must do so, that the plaintiff's assumption that he can recover, where there has been no judgment against the assured by the employee, and no payment by it of the latter's claim or any part thereof, is based upon the last words we have taken from the opinion in *Clark v. Bonsal, supra,* as to the attachment or sequestration of the assured's claim against the indemnity company. But such an inference from that language is manifestly not warranted. Before any claim can be sequestered, it must take the form of a right to sue the indemnity company, because of a loss sustained by the assured, and this right does not accrue to the assured "until some damage has been sustained, either by payment of the whole sum or some part of an employee's claim" by the employer, according to the following passage taken from the opinion

in that case: "But, unless the contract expressly provides that it is taken out for the benefit of the injured employees and the payment of recoveries by them, none of the cases holds that an injured employee may, in the first instance, proceed directly against the insurance company." The Court, in *Bain v. Atkins,* 181 Mass., 240, approved in *Clark v. Bonsal, supra,* is to the same effect, as will appear by this language: "The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against loss from legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidently injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest any more than in any other property belonging absolutely to Atkins." This Court, in *Clark v. Bonsal, supra,* after stating the foregoing view, held that the complaint in that case, which is similar to the one in this and substantially the same, did not allege a cause of action against the insurance company, and that it did not aver facts sufficient to show any present right to recover against it "nor to have judgment in any way directly affecting its rights. It is then said that "the principle is very well stated in 30 Cyc., 125, as follows: 'It is not sufficient reason for joining a person as defendant that the adjudication of the case at bar may determine points of law adversely to its interests. As a rule, the record must show a responsible interest in all the defendants,' citing, among other cases, *Conkling v. Thurston,* 18 Ind., 290; *U. S. v. Pratt Coke and Coal Co.,* 18 Fed., 708."

The case of *Clark v. Bonsal, supra,* was approved in *Hensley v. Furniture Co., supra,* and more recently in *Lowe v. Fidelity Co.,* 170 N. C., 445, where the Court held, in accordance with the ruling of the courts in other States, that "when a contract of indemnity is clearly against loss, no action will lie in favor of the insured until some damage has been sustained, either by the payment of the whole or some part of the em-

ployee's claim," thereby adopting the principle and also the very language of the other two cases, which it cites together with *Finley v. Casualty Co.*, 113 Tenn., 598; *Casualty Co. v. Martin*, 163 Ky., 12.

So that it appears to be thoroughly well settled that in a case of this kind there can be no recovery by the employee against the indemnity company until there has been a loss by the assured in the manner described in the decisions to which we have referred, and such a loss had not been suffered in this case.

The other positions taken by the plaintiff are untenable and require no discussion, as the case turns upon the question we have considered. The same stipulations are in this policy which are in those upon which the above decisions were based.

It was, therefore, error to overrule the demurrer. It should have been sustained as to the Maryland Casualty Company, and the action as to it must be dismissed.

Reversed.

C. S. WILLIAMS v. ISAAC H. KEARNEY AND H. C. KEARNEY.

(Filed 26 March, 1919.)

1. Appeal and Error—Case Remanded—References—Account—Credits.

It appearing on appeal from a judgment rendered upon the report of a referee that the appellant has not been given advantage of certain material admissions the case will be remanded for that purpose.

2. New Trials—Appeal and Error—Accounts—Credits—Newly Discovered Evidence.

Where it appears on appeal in an action involving an account between the parties that the judge failed to regard a paid check given by one of them to the other as evidence, and the credit was not allowed, the check may be regarded in the Supreme Court as newly discovered evidence and the case remanded for it to be passed upon.

3. Appeal and Error—Reference—Findings—Case Remanded.

The report of the referee, supported by evidence and approved by the trial judge, is conclusive on appeal; but the Supreme Court may remand the case for additional, more definite or fuller findings as to certain items When such appears to be required.

APPEAL by plaintiff from *Calvert, J.*, at the August Term, 1918, of FRANKLIN.

This is an action to recover money alleged to be due by note and by open account, in which the defendant pleaded a counterclaim.

The plaintiff alleges in his complaint that the defendant is indebted to him in the sum of $10,000 or $12,000, by note and open account,

and the defendant in his answer admits part of the debt to be due and alleges that the plaintiff is indebted to him in the sum of about $14,000, due by open account.

The accounts of the plaintiff and the defendant involve many items and cover several years.

The issues raised by the pleadings were tried before a referee and on account stated, and they were then heard by his Honor on exceptions filed by the plaintiff to the report, and judgment was rendered in favor of the plaintiff for $946.22, with interest from 26 August, 1918, from which the plaintiff appealed, contending that he was entitled to a larger recovery.

T. T. Hicks attorney for plaintiff.
W. M. Person attorney for defendant.

PER CURIAM. The defendant admits that there is a mistake in the account against the plaintiff of $33.51 for sawing timber, and that he was in possession of the McGee farm and was allowed in the account $288 for repairs made while in possession, and that he was not charged with the rental value of $200.

The judgment must be reformed in these two particulars as the mistake as to the timber is admitted, and the defendant, having had the use and possession of the McGee farm, and being allowed for his repairs, is justly chargeable with the rental value.

At the hearing of the exceptions before his Honor the plaintiff produced a check drawn by himself in favor of the defendant and showing on its face that it had been given for cotton seed, and contended that the check had been collected by the defendant, and that although he had been charged with the value of the cotton seed he had not been given credit for the check.

His Honor, not understanding that the check was offered in evidence, did not pass on this contention of the plaintiff, and to the end that a true account may be stated, and treating the application of the plaintiff as in the nature of a motion for a new trial for newly discovered evidence, the cause is remanded with the direction to hear evidence and find the facts, and to allow or disallow the credit for the check according as the facts are found.

The court is also directed to make more specific findings on the following contentions:

1. The plaintiff contends that the purchase price of the Hight land was $3,775.50 and that the note executed for a part of the purchase money was $3,303.56, and that he paid the difference between these two amounts and has been allowed no credit therefor.

This seems to be admitted by the defendant, but the fact is not specifically found by the referee or by the court.

2. The plaintiff contends that he paid for the Armory lot for the benefit of the defendant and that certain cotton delivered to him and with which he has been charged was in payment therefor, and that this ought to be stricken out or that he ought to be credited with the price of the lot.

We are not able to determine from the report just how far these contentions have been passed upon in the findings of fact, and the court will therefore make additional findings thereon.

The other exceptions of the plaintiff, except as to interest, which has not been pressed upon the argument because interest was not allowed on either account, involve practically findings of fact, supported by evidence, which are conclusive upon us, and the judgment, except as modified by correcting the mistake as to the timber and the rental value of the McGee lot, is affirmed, reserving, however, further modification of the judgment in accordance with the findings upon the three items herein specifically referred to, to wit, the check presented to his Honor, the difference between the note executed and the purchase price of the Hight lot and the items of debit and credit as to the Armory lot.

Remanded.

BOWEN PIANO COMPANY v. J. J. NEWELL AND WIFE, S. C. NEWELL.

(Filed 9 April, 1919.)

1. **Removal of Causes—Transfer of Causes—Venue—Motions—Actions Dismissed.**

   An appeal will directly lie from a refusal to remove a cause because of a wrong venue, though as a general rule not from a motion to dismiss an action.

2. **Removal of Causes—Transfer of Causes—Motions—Court's Jurisdiction—Actions—Dismissed.**

   When the court has general jurisdiction of the subject-matter of the action a motion to dismiss for improper venue or place of trial will be denied.

3. **Removal of Causes—Transfer of Causes—Conditional Sales—Personalty—Debt—Incident—Mortgages.**

   In an action to recover an amount due upon a conditional sale of personal property, the security is but an incident to the cause, and the fact that the property is situated in another county than that of the venue will not alone be sufficient for a removal of the action thereto.

ACTION tried before *Starbuck, J.,* in Forsyth County Court, and on appeal tried before *Bryson, J.,* at January Term, 1919, of FORSYTH.

This action was brought to recover a debt secured by a conditional sale note. The plaintiff, who lives in Forsyth, also sought to recover possession of the personal property—one piano, described in the note, which was situated in Lee County. Plaintiff demands possession of the piano and for an order to sell the same and apply the proceeds of the sale to the payment of the note sued on.

Defendants are residents of Lee County where, as defendants allege, the contract was made. Plaintiff lives in Forsyth County, where this action was commenced and is pending. Defendants, in apt time and in writing, moved to dismiss the action because the court had no jurisdiction to try the case. This motion was overruled, and defendants excepted. They then asked, in writing, that the case be removed to the Superior Court, so that the trial can be held in the proper county, as provided by statute. This request was also denied, and they again excepted.

The facts found by Judge Starbuck, as to the motions, were as follows: "The plaintiff is, and was at the time of beginning this action, a resident of Forsyth County. The piano described in the complaint is, and was at the time of beginning his action, at the home of the defendants in Lee County, and the defendants are now and were then residents of Lee County. The court is of opinion, under section 2 (*b*), 9 and 17 of the acts creating the Forsyth County Court, chapter 520, Public Local-Laws of North Carolina, session 1915, that actions falling within the provisions of civil procedure relating to venue are removable from said court to the Superior Courts of other counties, but upon inspection of the complaint the court considers that the plaintiff's cause of action is for the recovery of the amount alleged to be due by the defendants to the plaintiff on the note set out in the complaint, and that the recovery of possession of the piano is incidental thereto for the purpose of foreclosure and application of so much of the proceeds as may be necessary to the satisfaction of the judgment on the note. It is therefore ordered that the motion to dismiss be denied and that the motion to remove be denied."

In the Superior Court, the findings of fact by Judge Starbuck were approved and adopted as those of the latter court, which affirmed the ruling of the County Court, and refused to dismiss the action or to remove it. Defendants again excepted and appealed.

Frank T. Baldwin for plaintiff.
Fred S. Hutchins and Louis M. Swink for defendants.

PER CURIAM. While, as a general rule, an appeal does not lie from the refusal to dismiss an action, Pell's Rev., p. 313, sec. 587, where

many of the cases are collected, it does lie from a refusal to remove because of a wrong venue. Pell's Rev., p. 309, ch. 12, sec. 587, citing *Brown v. Cogdell,* 136 N. C., 32, and other cases. The motion to dismiss, though, was properly overruled, as it was not a question of jurisdiction but of venue, or place of trial. The court had general jurisdiction of such actions, and we must, therefore, confine our inquiry to the second ground of the motion. We are of the opinion that both Judge Starbuck and Judge Bryson were right in refusing a removal on this ground.

The matter has been thoroughly well settled by our decisions and an independent discussion of it is not called for. A removal was requested in *Woodard v. Sauls,* 134 N. C., 274, in a case similar to this one and denied in the Superior Court. The judgment was affirmed here. It was there held that "Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located." Referring to that case in another of a like kind (*Clow v. McNeill,* 167 N. C., 212, at p. 214), *Justice Allen* said: "The action was improperly removed to the county of Lee, as it is an action for an accounting, and the ownership of the notes and bonds was only raised incidentally. The case of *Woodard v. Sauls,* 134 N. C., 274, is directly in point. In that case it was alleged that the defendant was indebted to the plaintiff by promissory notes and for further large sums, and that, to secure such indebtedness, had turned over to the plaintiff sundry notes; that the defendant afterwards got possession of a portion of said notes to be collected by him as agent of the plaintiff, and applied on said indebtedness, which the defendant had not done, and that the defendant got possession of another portion of said collaterals surreptitiously, without the knowledge or consent of the plaintiff, and retained the same, to recover which notes plaintiff sued out the ancillary proceeding of claim and delivery; and it was held that where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located, and that the action ought not to be removed. This case is not in conflict with *Brown v. Cogdell,* 136 N. C., 32, and *Edgerton v. Games,* 142 N. C., 223, as in the first of these cases the only question involved was the ownership of certain furniture, and in the second a separate and distinct cause of action was alleged in the complaint for the recovery of a horse."

It is also apparent, from reading the two cases, that *Mfg. Co. v. Brower,* 105 N. C., 440, and *Connor v. Dillard,* 129 N. C., 50, are not authorities in favor of a removal of this case, because the first of them was, as the court says, substantially for the foreclosure of a mortgage of land and the second for the sole subjection of the particular tract

of land described in the pleadings, to the payment of the debt, confining the entire relief for the satisfaction of the debt to that tract. That case was also in the nature of one for the foreclosure of a lien upon land. *Mfg. Co. v. Brower, supra.*

There was no error in the proceedings of the County and Superior Court.

Affirmed.

J. E. ALEXANDER v. RICHMOND CEDAR WORKS.

(Filed 9 April, 1919.)

New Trials—Newly Discovered Evidence—Laches—Burden of Proof.

The Supreme Court will not order a new trial for newly discovered evidence that is merely cumulative, or without probability that the result would be thereby changed, and the burden is upon the petitioner to show by the facts and circumstances, and not by his bare general averment, that he has been free from laches in not having produced it at the trial, or that its omission was not due to his lack of reasonable diligence.

PETITION for a new trial for newly discovered evidence on appeal from *Bond, J.,* at the November Term, 1918, of TYRRELL.

Aydlett, Simpson & Sawyer and W. L. Whitley for plaintiffs.
J. Crawford Biggs and Thompson & Wilson for defendant.

PER CURIAM. This is a petition for a new trial in the above entitled case, upon the ground of newly discovered testimony. The petition is denied for the following reasons:

1. The proposed testimony appears to be entirely cumulative, there being no new kind of evidence offered, and besides, there is nothing to reasonably indicate that the result will be changed.

2. There is no acceptable excuse given for the delay in procuring the new testimony, and no sufficient reason assigned for not having presented it at the trial of the action.

3. But another reason, and the main one, is that petitioners do not sufficiently show that they had been diligent in their efforts to produce this testimony at the trial, or, to put it conversely, they do not show that they have not been guilty of laches. They allege generally that laches cannot be imputed to them, but this will not do, as the facts should have been set forth so that we can determine whether laches existed. They could not decide that question for us by merely asserting that there had been no laches.

The petitioners have not brought themselves within the rule which we have adopted in regard to such applications as this one. We said in *Johnson v. R. R.,* 163 N. C., at p. 453, and its language, in most respects, is peculiarly applicable to this case: "Since this case was argued the defendant has moved for a new trial upon the ground of newly discovered evidence. Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 A. and E. Enc. Pl. and Pr., 790. We require, as a prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *Turner v. Davis,* 132 N. C., 187; *S. v. Starnes,* 97 N. C., 423; *Brown v. Mitchell,* 102 N. C., 347; *S. v. DeGraff,* 113 N. C., 688; *Schehan v. Malone,* 72 N. C., 59; *Mottu v. Davis,* 153 N. C., 160; *Aden v. Doub, ibid.,* 434. When we examine the affidavits of Hector Austen and the others, upon which the defendant bases its motion for a new trial, we find that they fall short of complying with the rule we have just stated. In some respects the proposed testimony is merely cumulative, and in others it only tends to contradict or impeach the plaintiff's witnesses at the trial. It is not very definite. The witness does not speak with sufficient positiveness and directness to give us the slightest assurance that there will be a different result if we grant the application. . . . It is not satisfactorily shown that the testimony of the witness, if desired, could not have been secured at the trial by the exercise of proper diligence. We are convinced that the testimony, if it had been introduced before, would not have changed the result. We refer now to the second affidavit of Hector Austen, made in behalf of plaintiff." See *Wheeler v. Cole,* 164 N. C., 378; *Padgett v. McCoy,* 167 N. C., 508; *Gainey v. Godwin,* 171 N. C., 754; *Steeley v. Lumber Co.,* 165 N. C., 35. If we should grant this application upon the case as made out by the petitioners, even giving to it the best possible construction in their favor, we would have to do so in every case which is based upon the ground that there is additional testimony which might have been produced with reasonable effort, and there would consequently be no end of trials, for there are a very few if any cases where it could not be alleged that the losing party has lost

the benefit of evidence which they are prepared to introduce if permitted to do so. But we put our decision chiefly upon the ground that a want of laches has not been sufficiently shown. Laches is negligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights. The word is generally a synonym of "remissness," "dilatoriness," "unreasonable or unexcused delay," the opposite of "vigilance," and means a want of activity and diligence in making a claim or moving for the enforcement of a right (particularly in equity) which will afford ground for presuming against it, or for refusing relief, where that is discretionary with the court. It may be that petitioners were actually free from laches, but if so, it should have appeared affirmatively, the burden of showing diligence being upon them. It is not sufficient to allege it but it must be proven with reasonable certainty. Indifference to one's interests will not be excused by the law, as it requires of a party that he should devote that care and attention to his case which a man of ordinary prudence bestows upon his important business affairs. *Roberts v. Allman,* 106 N. C., 391; *McLeod v. Gooch,* 162 N. C., 122; *Dell School v. Pierce,* 163 N. C., 424; 16 N. J. Eq., 242. Laches presupposes not only lapse of time but also the existence of circumstances which render negligence imputable, and unless reasonable diligence is shown in the prosecution of a claim to relief, the Court, acting on the familiar maxim of the law as to giving preference to one who has been watchful of his rights rather than one who has slept upon them, will decline to interfere.

Petition dismissed.

W. L. LANGLEY v. C. A. MISENHEIMER.

(Filed 21 May, 1919.)

Negligence— Explosives— Dynamite— Master and Servant— Evidence— Instructions—Trials.

In this action to recover damages for the alleged negligence of defendant's employees having in their possession, with the knowledge of the defendant and for his use, dynamite caps, one of which was carelessly left or exposed and exploded, causing the injury to plaintiff, defendant's lessee, while engaged in defendant's service, the evidence was unconflicting that, of two of these employees, the caps in their possession could not have caused the injury, or that the defendant could not have been aware of the fact that they had them, leaving evidence only of one of these employees having the caps under circumstances wherein the defendant could have been held responsible: *Held*, not error to the plaintiff's prejudice for the judge in his charge to confine the jury in their inquiry to this one

employee, and not objectionable under a further charge that the defendant would be responsible if any employee had carelessly so left these caps that they exploded, and thus proximately caused the injury alleged.

APPEAL by plaintiff from *Harding, J.*, at the September Term, 1918, of GASTON.

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff by the explosion of a dynamite cap on the lands of the defendant, which the plaintiff had leased, the plaintiff at the time of the explosion being engaged in heating water for killing hogs of the defendant.

The plaintiff was injured on 24 February, 1914. The evidence tended to show that in August, 1913, the defendant had a stone house built on said land within about twenty feet of the house at that time occupied by tenants of the defendant, and that dynamite was used in blasting rock for the construction of the house; that John Fisher, who was then a tenant and employee of the defendant and living upon the premises, bought the dynamite with the knowledge of the defendant; that while the house was being built Moses Wright, another employee of the defendant, was seen at one time to bring a bundle of dynamite from the house and place it on the ground not far from the place of the explosion, in February, while he lighted a pipe, and that he then took up the bundle and carried it to the place of the blasting three or four hundred yards distant; that another employee of the defendant named Robinson bought fifty sticks of dynamite, all of which was used in shooting holes for the planting of pecan trees.

There was no evidence that any part of the dynamite brought from the house by Wright was left on the ground nor was there any evidence that the dynamite used by Robinson was at any time in or near the premises where the explosion took place, and Fisher testified that he did not carry the dynamite he bought for the defendant near the place of the explosion, and, on the contrary, he stored it in a house about a hundred yards distant.

His Honor, among other things, charged the jury as follows: "That there is no evidence in this case from which the jury can find that the dynamite cap which the plaintiff claims exploded, causing his injury, was left on the premises by any other tenant or employee of the defendant than Fisher, and therefore, in passing upon the issue of negligence, the jury will leave out of their consideration altogether evidence tending to show that one German Robinson had some time prior to the plaintiff's injury used dynamite caps in a field some one-fourth or half mile from the place of the injury for the purpose of blasting holes for pecan trees," and the plaintiff excepted upon the ground that the charge

excluded from the jury the consideration of the conduct of all the employees of the defendant except Fisher.

There was a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff appealed.

Mangum & Woltz attorneys for plaintiff.

Cansler & Cansler, Carpenter & Carpenter, and Thaddeus A. Adams attorneys for defendant.

PER CURIAM. The evidence in this case, while probably sufficient to be submitted to a jury, was largely conjectural in character.

The injury was in February, 1914, and the evidence shows that the dynamite carried on the premises, with the consent of the defendant, was used in August, 1913, six months before.

The explosion was in the yard about twenty feet from the house, and there is no evidence that any one procured dynamite except Fisher and Robinson.

Fisher testified: "As to where I took the dynamite when I carried it home, will say there was a cotton house about one hundred yards from the house, so I took it there and put it there. I had children and did not want them to get hold of the dynamite and caps, and I locked the dynamite and caps up. As to how far from the cotton house the blasting was done and which way you would go from cotton house to the blasting, will say some three or four hundred yards; cotton house was between the house and the place where the blasting was done.

"No, I didn't pass through the yard either way. I remember there was one negro helping me with the blasting and he bored one more hole than I had caps for. I thought I had more caps and dynamite and I had used all the dynamite and caps I had."

And Robinson: "Lived on Dr. Misenheimer's farm in 1912. Used fifty dynamite caps to shoot out pecan tree holes. Dr. Misenheimer told me to use them; got them at the Charlotte Hardware Company in January, 1912. Carried them to the field where the pecan trees was, about half a mile from the house. The pecan orchard was between Charlotte and the house. Never carried none of those dynamite caps or any of the dynamite to the house; put them in a sack at Charlotte Hardware Company and put them out there in an old field until I could use them."

The only other evidence of dynamite in possession of any employee of the defendant is from a witness Brice, who said: "I saw Moses Wright come out of the house with dynamite wrapped up in paper. Came out of the porch, and he stopped to light his pipe there where I was waiting on the masons, and after he lighted his pipe he took the

dynamite and went on down the road. Just saw the dynamite; did not see the caps at all; saw the fuse; the paper was not tied up; was in a bundle like. I did not see no strings to it. After he got done lighting his pipe, picked it up and went on."

This recital of the evidence shows that the dynamite used by Robinson was not at any time near the place of the explosion, that he had only fifty sticks, and that all were used in shooting the holes for the pecan trees, and the part of the charge excepted to was simply for the purpose of excluding from the consideration of the jury the evidence as to Robinson's having dynamite, with the knowledge and approval of the defendant, which it was proper to do. He could also with propriety have excluded the consideration of the dynamite brought from the house by Wright because the same witness who testified to this fact said that after Wright lighted his pipe he picked up the bundle and carried the dynamite away, and there is no evidence that any part of the dynamite was left on the ground, but his Honor did not withdraw this evidence from the jury, and on the contrary he charged the jury as follows, at the request of the plaintiff: "Although the plaintiff did not show by direct evidence as to how any dynamite cap which exploded and injured the plaintiff, if you find a dynamite cap did explode and injure the plaintiff, was placed in or near the fire mentioned in plaintiff's evidence, if you find it was so placed, still if, from all the circumstances, you find by a greater weight of the evidence that any such cap was carelessly left at said place *by any employee* of the defendant acting within the scope of his employment, and the plaintiff was injured by an explosion of such cap, and any such careless acts were the proximate cause of plaintiff's injury, it will be your duty to answer the first issue 'Yes,'" thereby leaving the evidence as to Moses Wright, who was an employee, to the jury.

We have carefully examined the record and find no error which entitles the plaintiff to a reversal of the judgment.

No error.

STATE v. JONAH OGLESTON AND OTIS PERRY.

(Filed 19 March, 1919.)

1. Spirituous Liquor— Criminal Law— Manufacture— Evidence— Questions for Jury—Nonsuit—Trials.

Evidence that the defendants, indicted for the unlawful sale of spirituous liquor, were the only ones found at a still, in active operation, within a mile of their home, one standing with his back to the fire of the still

and the other reclining on the ground near-by, permits the inference that they were operating it, and is sufficient to take the case to the jury, and a motion as of nonsuit was properly denied.

2. **Spirituous Liquor— Criminal Law— Manufacture— Aider and Abettor— Instructions.**

Where the evidence is sufficient for the unlawful manufacture of liquor, a charge to the jury that they may find the defendants guilty if they were aiding or abetting such manufacture, under the statute (ch. 158, p. 310, Laws 1917), was not erroneous.

APPEAL by defendants from *Allen, J.*, at the December Term, 1918, of LENOIR.

The defendants—Perry, a white man, and Ogleston, a negro—were convicted under an indictment charging the unlawful manufacture of spirituous liquors and appealed from the judgment rendered upon the verdict.

The exceptions taken by the defendants are: (1) To the refusal to enter judgment of nonsuit upon the ground that the evidence was not sufficient to sustain a verdict of guilty; (2) to the following charge given to the jury:

"Under this act (reading chapter 158, page 310, Laws of 1917), notwithstanding the charge is for the manufacture of spirituous liquors, you can convict either of the defendants for aiding and abetting the manufacturing of spirituous liquors."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. S. O'B. Robinson and T. C. Wooten attorneys for defendants.

PER CURIAM. The evidence is, in our opinion, fully sufficient to support the verdict. It tends to prove that the sheriff of Lenoir County, with two deputies, found a still in the woods a mile behind the houses where the defendants lived; that the still was in active operation with a fire under the furnace and the spirits running from the spout of the still into a bucket; that Ogleston, who admitted that he had before that time engaged in the manufacture of spirituous liquors, was standing in front of the fire with his back to the still, and that Perry was sitting down; that each of the defendants had a gun and that the two guns were wrapped up together and were near the defendants, and that no one else was at or about the still.

As the still was in active operation and as the defendants were the only persons present the inference was at least permissible that the defendants were in charge of the still and operating it.

The charge of his Honor is sustained by *S. v. Horner,* 174 N. C.,

792, in which the Court says: "It makes no difference whether defendant was a principal in the first degree or in the second degree as an aider and abettor. The latter is but a lower grade of the principal offense, viz, the distilling or manufacturing of the liquor. An aider and abettor is denominated in the books as a principal in the second degree."

No error.

STATE v. ED. PITTS.

(Filed 9 April, 1919.)

1. **Intoxicating Liquors—Evidence—Denial—Admissions—Instructions.**

Testimony of a witness that the defendant remained silent when charged with selling spirituous liquor by those in whose possession it had been found, under circumstances affording him an opportunity for denial, free from restraint, is *prima facie* competent evidence upon his trial for violating the prohibition law of the State, though it should be cautiously received, with instructions to the jury as to its essential elements.

2. **Appeal and Error—Prejudice—Harmless Error—Objections and Exceptions—Court's Discretion.**

The erroneous admission of evidence not prejudicial to the appellant is not reversible error; and where objection is made too late it is discretionary with the trial judge as to whether he will strike it out, and his action thereon is not reviewable on appeal.

ACTION tried before *Lane, J.*, and a jury, at the December Term, 1918, of FORSYTH.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. T. Wilson for defendant.

PER CURIAM. The indictment, with four counts, was for selling liquor; for keeping liquor in defendant's possession for sale; for receiving more than one quart of liquor within a period of fifteen days, and for shipping or transporting from places within and places without this State to persons in this State, in one package and at one time, more than one quart of spirituous and vinous liquor and intoxicating bitters, and more than five gallons of malt liquors, it being transported and delivered in one package, which was contained in more than one receptacle. The defendant was convicted, and from the judgment upon the verdict, having excepted, he appealed.

There was evidence, fully sufficient and very convincing, to support the verdict of guilty, and there is no ground of complaint on that score.

It was competent to show by the witness George W. Flynt that Sam Johnson and a negro, who were in a buggy driving away from defendant's shop, stated to him, in the presence and hearing of the defendant, that they had just bought from the defendant the liquor, which they then had in their possession, and that the defendant said nothing when this accusation of selling liquor was made against him, but remained silent and mute. Sam Johnson had two pints, for which he gave two dollars a pint, and the negro one pint, for which he gave two dollars, and this was stated in the hearing of the defendant, and he again made no reply to the charge, but stood mute. Objection was taken to this evidence, but it was undoubtedly competent, as an innocent man similarly situated would naturally speak in denial, the charge of his guilt being direct and explicit, and calling for a denial if he was innocent. He also had full and fair opportunity to answer the accusation. The case is, therefore, well within the rule as stated in *S. v. Jackson,* 150 N. C., 831. It was said in *S. v. Sugg,* 89 N. C., 530 (approved and cited in *S. v. Walton,* 172 N. C., 931): "A declaration in the presence of a party to a cause becomes evidence after showing that the party, on hearing such a statement, did not deny its truth; for if he is silent when he ought to have denied, there is a presumption of his acquiescence. And where a statement is made, either to a man or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is well founded, or he would have repelled it." This kind of evidence is admitted under the maxim that he who is silent when he is called upon to speak, in the protection of his interests, and has the opportunity of doing so, is to be taken as consenting to what is said by another in his presence and hearing. 2 Taylor on Evidence (Am. notes by Chamberlayne), p. 527; *S. v. Jackson, supra; S. v. Walton, supra.* Such evidence should be received cautiously, and while the judge may have held it to be *prima facie* admissible on the facts as they appeared to him, the jury should be carefully instructed in regard to it, and directed to disregard it, if they ultimately find that any of the essential elements, which are required to make it competent and which should be explained to the jury, are missing. *S. v. Walton, supra; S. v. Booker,* 68 W. Va., 8. Defendant's conduct should be free and voluntary, and not influenced by duress or promises held out to him, as in the case of other confessions or admissions.

The remaining exceptions are without any merit. Most of the questions to which objection was taken were answered favorably to the defendant, or at least in a way that did not prejudice him, and the others, if not competent, were harmless. The evidence of Mrs. Ed. Pitts, to which the defendant objected, was competent, when it is con-

sidered in connection with the other parts of her testimony, and at least so upon the charge of keeping liquor for sale. Besides, one of the three objections came too late, and it was discretionary with the judge whether he would strike out the testimony. The answers to the other objections were harmless, if not favorable to defendants. The last question was not answered. *In re Smith's Will,* 163 N. C., 464; *Schas v. Ins. Co.,* 170 N. C., at p. 421. None of these rulings was prejudicial, and therefore they cannot be assigned as error. *S. v. Shoemaker,* 101 N. C., 690; *S. v. Eller,* 104 N. C., 853; *S. v. Anderson,* 92 N. C., 732; *S. v. DeGraff,* 113 N. C., 688.

We cannot find in the record any cause to reverse the judgment and grant a new trial.

No error.

STATE v. BRYANT SIMMERSON.

(Filed 9 April, 1919.)

1. Courts—Term—Continuance from Day to Day—Order of Judge—Sheriffs—Validity of Trials.

A judge of the Superior Court whose term of office commences 1 January acts both *de facto* and *de jure* at a term of court commencing by statute on 30 December previous thereto and continuing several weeks, when the sheriff, under his direction, has continued the court from day to day, not exceeding four days, and he qualifies, appears and commences to hold the term within that time, and the validity of a trial objected to on that ground will be sustained.

2. Spirituous Liquors—Intoxicants—Possession—Purpose of Sale—Burden of Proof.

Upon trial for having in possession more than one gallon of spirituous liquor for the purpose of sale, the sale of intoxicants is the gravamen of the offense, and the guilt of the defendant may be established whether he had a less quantity or not, the quantity specified making a *prima facie* case under the statute, the burden of proof in either event being upon the State to establish the facts that constitute the unlawful purpose of sale.

APPEAL by defendant from *Bryson, J.,* at January Term, 1919, of FORSYTH.

Indictment for having in possession more than one gallon of spirituous liquor for purposes of sale. The defendant was tried and convicted in the municipal court of Forsyth and on appeal to the Superior Court was again convicted. He moved in arrest of judgment because that the term which should have been begun 30 December, 1918, was continued by the sheriff until 3 January, when Bryson, J., whose term of office began 1 January, 1919, arrived and opened court. The plea is pre-

sented that the trial, conviction and sentence were illegal because the court had no jurisdiction. Motion denied, and defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Hastings & Whicker, Benbow, Hall & Benbow for defendant.

CLARK, C. J. The question here raised as to the validity of this same term of the Court, which was not opened until Friday, 3 January, 1918, was presented and fully discussed by *Walker, J.,* in *S. v. Harden, post,* 580, and it is not necessary to repeat what is there said.

On almost exactly the same state of facts, the same proposition of law was presented in *S. v. Wood,* 175 N. C., 815, 816. Though Judge Bryson was not sworn in till 3 January, 1919, he was a judge *de jure* and *de facto* when this case was tried. The motion in arrest was properly denied. *S. v. Hall,* 142 N. C., 713.

The court properly told the jury: "It is immaterial in so far as the guilt of the defendant is concerned, whether he had on hand a gallon or a pint of liquor or a gill of liquor, the gist of the offense is having on hand whiskey for the purpose of sale, and the amount kept on hand has nothing to do with the crime; but you will further note that by statute, where the State has shown to the jury by evidence which satisfies them beyond a reasonable doubt that the defendant had in his possession at one time more than a gallon of whiskey, then the statute raises the presumption it was had and possessed for the purpose of sale. That presumption is made by statute."

"If you find beyond a reasonable doubt that he had in his possession more than one gallon of whiskey, then the statute raises a presumption of guilt and makes what the law calls a *prima facie* case—such a case as the jury may convict upon or should not convict upon, as they would be satisfied therefrom. If you have a reasonable doubt in your mind of any of the material facts to constitute the guilt of the defendant it is your duty to return a verdict of not guilty."

No error.

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*SMITH v. WOODING.

(Filed 28 November, 1917.)

Discovery—Examination Before Trial—Aid in Pleading.

The plaintiff in an action for injuries by alleged neglect of a physician may, under Revisal 1905, sec. 866, providing that an examination of a

*Omitted by inadvertence from former Report.

defendant may be had at any time before the trial, have an examination of defendant to aid him in filing his complaint, where he alleges that he knows the facts generally and substantially, but that defendant has the precise knowledge necessary for proper proceedings.

APPEAL from *Webb, J.* MECKLENBURG. Action by W. M. Smith, administrator of G. C. Hahn, against Charles Edwin Wooding. From an order for examination of defendant before trial, he appeals. Affirmed.

This action was brought to recover damages for injuries to plaintiff's intestate, alleged to have resulted from the negligence of the defendant in the use and application of the X-ray in treating the intestate, which so burned the patient as to cause his death. Plaintiff moved before the clerk of the court for an order requiring the defendant to be examined before a commissioner, in order that plaintiff may obtain such knowledge and information as is necessary for him to have in order to prepare his complaint and make proper and sufficient allegations therein of his cause of action; such knowledge and information being in the possession of the defendant. An order was entered for such examination, and a commission issued to Fred M. Parrish, Esq., of Winston-Salem, N. C., to take the examination, and for that purpose that defendant appear before him at such time and place as he may appoint. The order was based upon an affidavit filed by the plaintiff, setting forth generally the nature of the action, and alleging that there are certain facts stated therein which are peculiarly within the knowledge of the defendant, and which are necessary to be known by the plaintiff in order that he may frame his complaint, and that he cannot obtain the facts from any other source. The defendant excepted to the order of the clerk, and appealed to the Superior Court. The judge dismissed the appeal, the defendant then appealed to this Court, and assigned these errors:

"1. That the court erred in holding that the statute was sufficient to require the examination of the defendant for the purpose of obtaining information upon which to file the complaint and in dismissing the appeal of defendant from the order of the clerk.

"2. In dismissing the appeal, for that the affidavit shows on its face that plaintiff had information sufficient to file his complaint."

F. M. Shannonhouse, W. S. Beam and Manly, Hendren & Womble for appellant.

E. T. Cansler and T. A. Adams for appellee.

WALKER, J., after stating the facts as above: The first assignment of error, we suppose, is intended to raise the question whether a party to an action as, for instance, the defendant in this case, may be examined

under the statute (Rev., secs. 864, 873) for the purpose of enabling the other party to file his pleading, or whether the provision of the statute is confined in its operation to evidence merely to be used or not at the trial, and to be taken after the pleadings are filed, or at least after the complaint has been filed, showing what is the cause of action. Section 866 of the Revisal provides that the examination "may be had at any time before the trial," and this court has held that these words, construed in connection with what precedes and follows them, authorize an examination of a party for the purpose of aiding him in filing his complaint. We refer to *Holt v. Warehouse Co.,* 116 N. C., 486, where the court discusses the question quite at length. The defendants in that case, and the parties designated for the examination, raised the point that it would require of them disclosures as to the act of fraud charged in the affidavit of the plaintiff, but the Court rejected this objection and said:

"Very cogent reasons must be shown this Court before it will conclude that such a right does not belong to the plaintiff. The plaintiff has commenced a civil action in the Superior Court of Alamance against the defendant for the purpose of setting aside an alleged pretended transfer by the defendant corporation. . . . To enable him to draw his complaint with greater certainty, the plaintiff desires to examine Neil Ellington, E. T. Garset, and J. W. Lindau, stockholders and directors of the company, under sections 580 and 581 of The Code. He has as much right to examine them before the trial as at the trial, and they are subject to the same rules of examination as prevail in the examination of witnesses on the trial of actions before the courts, and they are compelled to answer all pertinent and material questions put to them except such as the Constitution and laws relieve them from answering. We know of no such exemption, except a man may not be compelled to give evidence against himself, which is found in Art. I, sec. 2, of the Constitution, which section, by judicial construction, has been extended to witnesses in civil actions. *Fertilizer Co. v. Taylor,* 112 N. C., 141. It makes no difference whether the answer will result in pecuniary injury to the witnesses or not; they must answer the questions as they would be required to do before the courts."

The Court, therefore, affirmed the orders for the examination made by Judge Green, upon writs of *certiorari,* and also held that they were not appealable, citing for this ruling *Helms v. Green,* 105 N. C., 251; Am. St., 893; *Vann v. Lawrence,* 111 N. C., 32, and *Fertilizer Co. v. Taylor,* 112 N. C., 141; to which we add *Pender v. Mallett,* 122 N. C., 164, and *S. c.,* 123 N. C., 60. In the last case, *Pender v. Mallett,* 123 N. C., 60, the Court said that:

"Under Code, sec. 581, the defendant may be examined before plead-

ings filed to procure information in framing the complaint, as was the case in *Holt v. Warehouse Co.,* 116 N. C., 480, where it is held that an appeal from such order for an examination is premature and will be dismissed or the defendant may be examined, after the answer is filed, to procure evidence in the cause," citing *Helms v. Green, supra,* and *Vann v. Lawrence, supra.*

In *Bailey v. Matthews,* 156 N. C., 81, and *Fields v. Coleman,* 160 N. C., 11, the applications for the examinations were denied, and this Court affirmed the judgments upon other grounds, and the question as to the right to examine before the pleading is filed, for the purpose of aiding in preparing it, was not directly presented. We find that in *Blossom v. Ludington,* 32 Wis., 212, the Court, when construing a statute, substantially if not literally the same as ours, has held that the examination may be ordered before the pleading is filed. The Court then said:

"The practice in regard to the examination of a party in a case like the one before us does not seem to be regulated by statute nor by any general rule of Court. It is enacted that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, but that a party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled to give testimony in the action in the same manner and subject to the same rules of examination as any other witness. Sec. 54, ch. 137, R. S. This provision was obviously adopted for the purpose of abolishing the bill of discovery and to provide a substitute therefor. By section 55 it is enacted that the examination provided for in the previous section may be had, either on the trial of the action or at any time before trial, at the option of the party claiming it, before a judge of the court, or county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge order otherwise. . . . In this case the order for the examination was made upon the affidavit and complaint, and was designed to aid the plaintiff in determining whether any amendment to the complaint was necessary."

The court held that the examination should proceed so that plaintiff might acquire information necessary to amend his complaint, but that the right to examine was not an absolute and unrestricted one, and then said, if it were so:

"It is plain this statute may become the means of the greatest abuse and oppression. For an unscrupulous party has but to commence his action and then insist upon the examination of the adverse party for the purpose of discovery, and compel the disclosure of matters wholly

impertinent to his case, and in which he has no interest, merely to gratify his malice or curiosity. And so much injustice might be done by such an unrestricted, roving examination of a party that we have earnestly endeavored to so interpret the statute as to secure the object of its enactment and at the same time give the court in which the action is pending some power to restrict the examination within proper limits."

It was said in *Simmons v. Vanderbilt,* 59 How. Prac. (N. Y.), 411, that:

"When a proper case has been made for it, a party has an undoubted right to examine his adversary to enable him to prepare his pleadings."

Referring to the form and substance of the affidavit upon which the application was based, it further said:

"The plaintiff's affidavit is entirely defective. It states no fact whatever except that the defendant admitted 'the receipt of the money sued for.' The relations between the parties are undisclosed. The plaintiff gives us no insight into his real position; no clue to the averment that the moneys were received 'for his use.' Something should at least have transpired to justify the bringing of the suit and the framing of a general averment. So far the court should have been taken into the plaintiff's confidence. As it is, this affidavit is entirely blind. It seems studiously to avoid a frank disclosure of what induced the plaintiff to proceed. The order was therefore very properly vacated. It would be intolerable were parties to be subjected to inquisitorial examinations upon such papers."

We refer to these cases merely to show the clear and decided trend of judicial opinion in regard to the nature of this kind of proceeding, and not because they are directly applicable to this case, for they are not in all respects. Here the plaintiff has alleged sufficiently that while he has general information of the matter, it is not specific enough for a full and accurate preparation of his complaint, and that the facts essential for this purpose are within the knowledge of the defendant alone. The application appears to be perfectly fair and *bona fide,* and not made for the purpose of vexing or harassing the defendant, or from any ulterior motive, or from any other motive than that of protecting his rights. There is reason why he has no knowledge or information of the facts which is that the person who was treated at the defendant's hospital, or who was under his care as a surgeon, has since died and his evidence, therefore, is not available. The case is more like that of *Howe v. Learey,* 62 Hun., 241; 16 N. Y. Supp., 736, where it was said by the Court:

"The rigid rule, that if a party do not actually know the facts which make the defense, no order to examine can be granted, would render the section of the case in question of little practical use. The section

should have a broader scope. Where facts and circumstances are shown which justify an examination of a party so that a pleading may be framed for the trial of the issue, the order should be granted."

See, also, *Frothinghan v. R. R.*, 9 Civ. Proc. (N. Y.), 304; *Farmer v. Nat. L. Assn.*, 73 Hun, 523; 26 N. Y. Supp., 126.

As the court dismissed the appeal from the clerk, we merely affirm that order with the same result, of course, here

Affirmed.

STATE v. CHARLES BUSH.

(Filed 19 February, 1919.)

1. Spirituous Liquor—Possession—Evidence—Trials—Questions for Jury.

Evidence tending to show that the accused had more than one gallon of spirituous liquor for the purpose of sale in violation of the statute and arranged with the owner of an empty stable to place his trunk therein; that two trunks were hauled from the railroad depot there by a drayman hired by a third person, and one of these trunks were found by the police in the stable about dusk of the same day to contain thirty-six quarts of whiskey, and there was no explanation or evidence by the accused, who had disappeared at the time of the seizure and was afterwards brought back under arrest, is *Held* sufficient to sustain a conviction.

2. Same—Accomplice—Principal and Agent.

Where the evidence tends to show that the accused having more than one gallon of spirituous liquor for the purpose of sale had arranged with the owner of an empty stable for placing his trunk there, which was found on the same day to contain thirty-six quarts of whiskey, etc., other testimony that the trunk was hauled there by a drayman employed by a third person permits the inference by the jury that such third person acted either as the agent of or in collusion with the accused.

3. Spirituous Liquors—Possession—Instructions.

Where the evidence tends to show that the defendant had more than one gallon of whiskey in his possession, an instruction to the jury that the State must show beyond a reasonable doubt the facts of possession, as well as the purpose of unlawful sale, is favorable to the accused, of which he cannot complain.

4. Spirituous Liquors—Possession—Denial—Evidence.

Where a search warrant charges the possession of more than one gallon of whiskey, and forty-eight quarts are found, with evidence to show that it was in the actual or constructive possession of the defendant, it is sufficient for conviction, and the fact that he made no denial is competent evidence for the consideration of the jury.

5. Spirituous Liquors—Sentence—Hiring Out—Courts.

Where the defendant is convicted of having more than one gallon of

whiskey in his possession for the purpose of sale, a four-months sentence in jail is not excessive, and the court may give permission to work the prisoner on the public roads.

APPEAL by defendant from *Bond, J.*, at September Term, 1918, of PASQUOTANK.

The defendant was indicted and convicted in the recorder's court for having in his possession sixteen gallons of whiskey for the purposes of sale. On appeal to the Superior Court he was again convicted and appealed.

Attorney-General Manning, Assistant Attorney-General Nash and J. C. B. Ehringhaus for the State.

Aydlett, Simpson & Sawyer for defendant.

CLARK, C. J. The chief point pressed on the argument here was the refusal of the court to charge that "If the jury believed all the evidence to return a verdict of not guilty." The evidence against the defendant in the record, and as fairly summed up by the trial judge, is that the defendant about 10 a. m. came to the witness, Will Morris, the owner, and in charge of the stable, which was locked and not in use, and asked permission to have a trunk put in there. Morris says that he gave the defendant the key to the stable and soon after that he saw a trunk in the stable and that defendant did not return the key to him. Chief of Police Thomas testified that he went to the stables and found the trunk, and that it had forty-eight quarts of liquor in it. He had a search warrant but he could not find the defendant who left town that night about midnight, and was brought back from New Bern by an officer to whom papers had been sent for his arrest.

Morris, the owner of the stable, further says that the chief of police, Thomas, got the trunk which he saw in the stables; that Bush never came back for the trunk and never returned the key; that Bush in talking to him may have said that he would have two trunks to put in there. He says that he saw the trunk sitting in there between 10 and 2 o'clock, and there was no other trunk there that day; that the door was open and that the defendant was in the habit of carrying trunks about with different sets of harness with him which he used for race horse purposes.

The witness Gray, a colored drayman, says that he hauled a trunk that day; that he put it in Mr. Morris' stables; that the trunk was brought to him on a truck; that the truck came from the direction of where the cars were, though he did not see it brought out of the car; that in fact he hauled two trunks at that time, which was about 10 o'clock, and put them in Morris' stables; that he never saw the man

before who got him to haul the trunk out there, but it was not the defendant; that he doesn't know whether the trunks came out of the car or not; that the man who got him to haul the trunks was not the defendant and that the man asked him if he knew where Morris' stables were.

The chief of police further testified that he went to the car and found the horse in there and twelve cases of liquor, and that about dusk he saw this trunk (which was in court) in Morris' stables, and that it had forty-eight quarts of liquor in it; that he arrested a man whose name was Al Bush, who he noticed was dodging him, and used the searchlight on him. He found him in another stable.

It appears that Al Bush was convicted and does not appeal, and presumably the evidence as to him is not in this record.

The case stands therefore upon the above evidence, uncontradicted (for the defendant did not go on the stand or put on any evidence), that the defendant Charles Bush got the key from Morris, the owner of the stables, expressing the wish to put a trunk therein. A trunk was there about midday, and was searched about dusk by the chief of police who found forty-eight quarts of liquor in it. There is no explanation by or for the defendant to whom he gave the key, nor to contradict the presumption that this was his trunk, nor any explanation why when the search warrant was issued for the trunk he was not present, and why he left later that night for New Bern and was brought back by an officer under a capias issued for him in this case.

It is true that the colored drayman says that he hauled two trunks to Morris' stables that day for a man that he did not know, whom he had never seen before and would not recognize at the trial. Whether this "unknown" stranger acted in collusion with the defendant or was the agent of the defendant is a matter of inference, and there was no direct evidence as to this.

There was evidence that two horses were shipped into Elizabeth City that morning and that the car in which they came and from which it seems that the trunk or trunks was taken when searched contained twelve cases of whiskey hidden under the straw, and that the defendant and his father were down at that point that morning before the trunk was hauled to Morris' stables.

The illicit sale of whiskey, or the possession of it for the purposes of sale, is, like the crime of larceny, generally done furtively and direct evidence is not easily had. It is usually an inference to be drawn by the jury from a combination of circumstances. The court told the jury, "If you find that this evidence shows beyond a reasonable doubt that this man had charge of that liquor and had it in his possession for the purpose of selling it to other people, and you find that these two

facts are shown beyond a reasonable doubt, it would be your duty to return a verdict of guilty." This was too favorable to the defendant, for if the defendant was in actual or constructive possession by having control, the statute makes it evidence of the intent to sell, if there is more than one gallon. Laws 1913, ch. 44, sec. 2.

The court further charged the jury: "The trial of a man is a serious matter, and service upon a jury is one of the most serious responsibilities that a citizen can render. You should review the evidence, talk it over with each other, and then ask yourselves the question: Has it been shown beyond a reasonable doubt in this case that the defendant is guilty? If you say it has, return a verdict of guilty. If you say it has not, then return a verdict of not guilty." The defendant excepted to these two instructions, but we find no error therein of which he can complain.

When twelve impartial jurors, sworn to render a true verdict according to the evidence, have found that there was sufficient evidence to convince them beyond a reasonable doubt that the defendant has committed an act which is usually done by evasion and indirect means, the courts should be and are slow to find that there was no evidence in the case.

This offense is one that is committed from one of the lowest of motives, that of making profit by a violation of the laws of the State, and while the defendant is not called upon to prove himself innocent, we think there was sufficient evidence to create a belief beyond a reasonable doubt of the defendant's guilt, especially when there was no evidence to explain why a trunk placed in Morris' stables by the use of a key which he obtained from Morris for that purpose contained the liquor in question, and his simultaneous disappearance from town when the trunk was searched.

When a man is charged with crime and makes no denial, that of itself is competent evidence to go to the jury. Here the defendant was so charged by the search warrant. He did not come forward and deny that the trunk was his or that the liquor was there without his knowledge, but, on the contrary, left town that night. We do not feel justified in holding that the verdict of the jury, of the twelve good men and true, was based upon no evidence whatever.

The possession of more than one gallon of whiskey justified the jury in finding that the defendant had it for purposes of sale, Laws 1913, ch. 44, sec. 2; Gregory's Supp., 2080b (2); and constructive possession is sufficient, *S. v. Lee,* 164 N. C., 533.

The defendant also excepted because he was sentenced to four months in jail, but this was not excessive (*S. v. Denton,* 164 N. C., 530); and

the permission given by the court to work the defendant on the public roads was authorized. *S. v. Hicks,* 101 N. C., 747; *S. v. Farrington,* 141 N. C., 844.

No error.

STATE v. JIM LEWIS.

(Filed 26 February, 1919.)

1. Court's Discretion— Rape— Jurors— Special Venire— Writs— Entries— Orders—Nunc Pro Tunc—Appeal and Error.

Where the trial of a capital felony has been proceeded with, and the accused has not exhausted his peremptory challenges, it is within the discretion of the trial judge, not reviewable on appeal, in the absence of gross abuse or corruption in drawing and summoning the jurors, to correct an omission by the clerk to issue the writ for the special venire and to enter the order for it upon the minutes of the court by directing the omitted acts to be done by the clerk *nunc pro tunc* and the sheriff to make the proper return upon the writ.

2. Evidence—Contradiction—Rape—Trials.

Where the prisoner and his witnesses have testified, for the purpose of proving an alibi, that he was sick in bed for a period of time extending over two weeks, including the day on which the rape was committed, for which he was being tried, it is competent, in order to contradict these statements, for the State to show that during that time he was several times seen apparently well and going about at other places.

INDICTMENT tried before *Daniels, J.,* and a jury at November Term, 1918, of WAYNE.

The prisoner was charged with rape, committed on the person of Mrs. Sarah King, on 17 January, 1918. The prosecutrix testified that she was alone in the field picking cotton, about 5 o'clock in the afternoon, when the defendant approached her from the negro cemetery and asked her what she received for picking cotton, and then if the butcher wagon had passed by. He walked along the cotton row behind her, and when she reached the end of the row he seized her and threw her down to the ground, and had connection with her, by force and against her will. She cried out and he choked her. When he left, after being there a half hour, he went towards the branch. She met Mr. Jones on her way to her home and told him about it, and he went back with her to the place. She described minutely how the prisoner was dressed at the time, and stated that he had a gap in his teeth. She identified the prisoner as the man who assaulted her in the field, and expressed herself as being positive and sure that he is the man. She was corroborated

by Mr. Jones, who testified that he went to the field with Mrs. King and saw the place where, as she alleged, the act was committed, and it appeared as though there had been a struggle there. He further stated that there were bruises on Mrs. King's throat, and she was crying when he met her in the road. He accompanied her to her home and reported the facts to Mr. Fulghum, the constable, who also went to the place where Mrs. King was assaulted, and testified that there were indications of a struggle on the ground; that he went to the prisoner's home and found him in bed, and he said that he was sick, and was sick and in bed on 17 January, 1918, and had been sick ever since.

The defendant's witnesses testified that the prisoner was sick and in bed on 17 January, 1918, and for a week before and for a week after that day.

The State, in rebuttal, offered evidence tending to show that the prisoner had been seen by them, not in Goldsboro, where he was found by the constable, when he said that he was sick, and was then in bed, but in the country some two or three miles from Goldsboro, within the week before and the week after 17 January, 1918, and that he had chased Mrs. Loftin, and tried to grab her, and returned three nights afterwards and peeped in the window of her house. This evidence was admitted over the prisoner's objection, but was confined by the court strictly to its effect as contradicting the prisoner's declarations and the testimony of his witnesses as to his whereabouts at the time mentioned, though there was evidence that he ran when he saw one of the witnesses a few days after the alleged assault. None of this evidence was permitted to be used as substantive but only as tending to contradict the defendant's witnesses and his own statements.

A special venire of 40 jurors was ordered by the court, but the writ was not drawn out in writing and delivered to the sheriff at the time. When the case was again called for trial only twenty-two of this panel answered to their names, and five of these were excused, leaving seventeen for service. This number was exhausted and another order made for twenty special jurors, and there was a third order made for ten jurors, and the sheriff summoned the members of a jury which had just rendered their verdict in another case and were dismissed until a later day in the term. A jury was finally selected, without the prisoner having exhausted his peremptory challenges, he having made use of only nine of them. When it was discovered that no formal writ had been issued for the forty jurors the court, on motion, ordered the writ to issue *nunc pro tunc,* and the sheriff to make his return thereon, which was done, he stating that he could only find twenty-two of the forty summoned after proper search for them. These proceedings of the court were all duly and severally objected to by the prisoner, and his

objections were overruled, and they are now assigned as error.

He was convicted, sentenced to death, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. F. Tayloe and J. Faison Thompson for defendant.

WALKER, J., after stating the case: We have no doubt as to the power of the court to amend its record by inserting the order for the summoning of the special venire, and the issuing of the writ to the sheriff, and the entering of his return upon the process *nunc pro tunc.* The order for these amendments and the correction of what was overlooked by the officers, that is, the clerk and the sheriff, related back to the time when the order or writ should have been issued by the clerk, and the return made thereon by the sheriff. When the court has the power we do not review its exercise, as it is within the discretion of the court to decide whether it will exercise it or not. There are a vast number of authorities for this position, and there is nothing better settled by our cases than this rule. *Phillipse v. Higdon,* 44 N. C., 381; *Clark v. Hellen,* 23 N. C., 421 (approved in *Henderson v. Graham,* 84 N. C., 496); *Seawell v. Bank,* 14 N. C., 279; *Cheatham v. Crews,* 81 N. C., 343; *S. v. Cauble,* 70 N. C., 62; *Bullard v. Johnson,* 65 N. C., 436; *Williams v. Weaver,* 101 N. C., 1; *Lutterell v. Martin,* 112 N. C., 593; *Grady v. R. R.,* 116 N. C., 952. There are many other cases more or less analogous to this one.

In *S. v. Cauble, supra,* this Court held that the Superior Court had the power to amend the warrant by striking out the name of the prosecutor as plaintiff, it then having the form of a civil action, and inserting the name of the State, *Justice Bynum* saying: "The power of the court to make any amendment in furtherance of justice is ample. C. C. P., sec. 132. The change did not affect the defense or take the defendant at a disadvantage, and he therefore has no cause of complaint." It was held in *Clark v. Hellen, supra,* and *Chief Justice Smith* stated in *Henderson v. Graham, supra,* approving *Clark v. Hellen:* "Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. *Phillips v. Holland,* 78 N. C., 31. The power has been exercised in numerous cases in this State and precedents established for the present application. Thus it is held that a seal may be affixed to a writ issued to another county after its return, and the process, void without seal, thus rendered effectual. *Clark v. Hellen,* 23 N. C., 421. And this may be done to a *fieri facias* under which the defendant's land has been sold, for the purpose

of perfecting the purchaser's title. The extent to which the power of amendment has been carried will appear in the numerous cases which have come before this Court, and to which it is needless to refer in detail. Some of them are cited in *Cheatham v. Crews,* 81 N. C., 343," citing *Purcell v. McFarland,* 23 N. C., 34; *Seawell v. Bank,* 14 N. C., 279. The power of the court to require the officers to do what *it had ordered to be done* is fully discussed in the very recent case of *Mann v. Mann,* 176 N. C., 353.

We therefore conclude that the court, in the exercise of its discretion, could amend the proceedings and allow the clerk to issue the writ and the sheriff to make a proper return *nunc pro tunc. S. v. Whitt,* 113 N. C., 716; *Lutrell v. Martin,* 112 N. C., 593; *Grady v. R. R.,* 116 N. C., 952. An officer may be allowed to amend his return of process so as to make it speak the truth, even though the amendments defeats the plaintiff's recovery of a penalty for a false return. *Stealman v. Greenwood,* 113 N. C., 355; *Swain v. Burden,* 124 N. C., 16; *Swain v. Phelps,* 125 N. C., 41. The judge's finding of facts shows that the omission here was purely clerical, and could in no way affect any substantial right, so to cure it was plainly within his discretion. There seems to have been no other irregularity alleged in the further proceeding to secure a jury, and if there was, it could not, in the absence of fraud or corruption, affect the rights of defendant. *S. v. Speaks,* 94 N. C., 865; *S. v. Hensley, ibid.,* 1021; *S. v. Whitson,* 111 N. C., 695; *S. v. Brogden,* 111 N. C., 656; *S. v. Whitt, supra; S. v. Parker,* 132 N. C., 1014.

In this record it appears that the court had ordered the sheriff to summon the venire of forty men, and it was the plain duty of the clerk to enter this order in the minutes, and of the sheriff to obey it. If the clerk failed to do so, by inadvertence, the court could, at any time, require him to supply the omission and to issue the writ, so that the sheriff could make his return. The jurors, who were named in the verbal order, were actually notified to appear at the court, so far as they could be found, and it amounted to nothing more than committing to writing that which was ordered to be done. How it could prejudice the prisoner in any way or in the least degree we fail to see. This assignment of error, therefore, is unavailing.

The evidence admitted by the court was manifestly competent for the single purpose of contradicting the prisoner's statement and the testimony of his witnesses that he was sick for two weeks, including 17 January, 1918, as one of the days, and it was thus restricted by the judge. This assignment also must be disallowed.

The other exceptions are merely formal.

There was sufficient evidence, in law, to support the verdict.

It must, therefore, be certified that there is no error in the case or record.

No error.

STATE v. I. W. DUNNING.

(Filed 12 March, 1919.)

1. Criminal Law—Assault—Deadly Weapon—Obstructing Justice—Assisting Arrest—Sheriffs—Constables.

An authorized officer of the law in arresting an offender may use such force, the degree of which is largely within his own judgment, as is necessary to accomplish his purpose; and when withstood, and his authority and purpose made known, he may use the force necessary to overcome resistance, to the extent of taking human life if that be required for the proper and efficient performance of his duty, without criminal liability, unless the force has been excessively and maliciously used or to such degree as amounts to a wanton abuse of authority; and this applies whether the offense charged be a felony or misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority and not dependent on the grade of the offense.

2. Same—Evidence.

Where an authorized officer of the law is indicted for an assault with a deadly weapon, a pistol, in arresting the prosecuting witness, and there is evidence tending to show that the prosecutor was a dangerous man, terrorizing the town, and the officer made an endeavor to arrest him and was acting under a proper warrant, which he previously made known to the prosecutor, but the latter came forward, threatening to cut him with an open knife and using abusive language, whereupon the officer shot him, though a way for retreat was open for him: *Held*, the evidence, if accepted by the jury as true, is sufficient for an acquittal, the rule as between individuals not applying to an officer acting under a warrant commanding him to make the arrest.

APPEAL by defendant from *Kerr, J.*, at the August Term, 1918, of BERTIE.

This is an indictment for an unlawful assault with a deadly weapon on one C. T. White while defendant, as constable and chief of police of the town of Aulander, was endeavoring to arrest the said prosecutor, C. T. White, for disorderly conduct in breach of the criminal law.

On the trial the defendant testified in his own behalf, and at the close of all the evidence the court charged the jury as follows:

"Gentlemen of the Jury, if you believe the evidence of the defendant L. W. Dunning, himself, I charge you that he is guilty, and if you so believe it, you will say guilty for your verdict."

Verdict of guilty. Judgment, and defendant excepted and appealed.

Attorney-General Manning, Assistant Attorney-General Nash and Winborne & Winborne for the State.

Winston & Matthews and Alex. Lassiter for defendant.

HOKE, J. There was evidence on the part of the State tending to convict the defendant, but the same does not accompany the record as no exception is made concerning it.

For the defense, I. W. Dunning, a witness in his own behalf, testified as follows:

I am the defendant. I have lived near and in Aulander, Bertie County, all my life. I am now twenty-four years old. Some three years ago I moved to Aulander to be near a physician for treatment. I went to Norfolk and underwent an operation and came back to Aulander. I have not been strong since then. The commissioners of the town of Aulander elected me constable and chief of police of the town. There was no other constable of the town nor any other policeman. I was the only one. I have known C. T. White all my life. He was then living in Aulander and had been living there a number of years. His reputation was that when under the influence of liquor he was a desperate and violent man. I know that of my own knowledge, because I had frequently seen him in that condition. He had been indicted for repeated assaults and for cutting people, and had been convicted. At the May election of this year in Aulander I was reelected constable by the people of the town. On the day in question, about 4 o'clock in the afternoon, complaint was made to me that C. T. White was drunk on the street, violently noisy, and profane in the presence of the public and of ladies passing on the street. I went up the street and found him at the main street crossing of the town, within a few yards of the postoffice, in the heart of the business section of the town and of the bank, and in the very center of the business part of the town. I went up to him. He had an open knife in his hand and was noisy and cursing. I ordered him to cease cursing and advised him to go home. I did not want to have to put him in the lockup, and thought I could get him quiet. He did quiet down for a few moments and came up to me and said he wanted me to give him his liquor. He claimed that he had been to Kelford and brought back two quarts of liquor, and said I had taken it. I told him I had not done so. He demanded that I let him search me, and to satisfy him, I did so. He felt in all my pockets until he came to the one in which I had my pistol, as I was then on duty. I told him he could not go in that pocket. Then he began to curse and abuse me and called me a most foul and loathsome name (too foul for this record). I backed back from him. He had me by the hand and was attempting to cut me. I was trying to arrest him.

This kept up for several minutes. Finally the mayor came up and quieted him down. Later he went in the barber shop and commenced raising a row and cursing Mr. Early, who was in the barber shop. Early finally got him down on the floor. I went to arrest him, and Early and his relatives said if I would let him alone they could get him to go home. He was quiet for but a moment, and came out in the street and commenced cursing Early and myself and threatened to kill us both. He had his open knife in his hand. I dodged about the town to keep out of his way. He completely terrorized the town. All the above occurred about three to four hours before I shot him. People came to me and complained, and finally about 10 o'clock Mr. A. T. Castellow, the mayor of the town, brought me a warrant charging disorderly conduct or a misdemeanor for the arrest of C. T. White, and told me to go at once and arrest him and bring him before him. During the early part of the evening and again after I got the warrant I called on several persons to go with me to assist in making the arrest. They all declined because they said they knew his desperate and dangerous character when under the influence of liquor, and they did not propose to get cut. I finally got a man to go with me. Then White was passing down the street with one Cox and going in the direction of the Cox place of business—his restaurant and pool room. I heard him cursing and threatening to kill me and Early; he was violent, cursing and noisy. He went in the Cox place of business and took a seat by the stove. It was a store some seventy feet deep. In the back was a pool room. Some young boys were there playing pool. The stove was in the middle of the house between the counters and about twenty feet from the door. I went in with my warrant in my hand. I then had my pistol in my pocket, and had not taken it out during the day or night. I had my hand on my pistol, which was in my hip pocket. I walked within ten or twelve feet of White and said, 'I have a warrant for you; consider yourself under arrest.' He got up with his open knife in his hand, and I said, 'Put up your knife and consider yourself under arrest.' He said, 'Damn you and your warrant, too; take your hand off your gun.' I again told him I had the warrant and to consider himself under arrest. He again replied, 'Damn you and your warrant, both; take your hand off your gun.' He then advanced towards me about one step with his knife open in his hand and drawn back in the attitude of striking. He did not get in striking distance of me; an open door opening on the street was behind me and there was nothing to keep me from going out of it. If I had stepped out of this door he could not have hurt me, but I did not go out of door because I did not want to run. The warrant I had for his arrest charged disorderly conduct or a misdemeanor."

And on this evidence we are of opinion that there was error in holding

the defendant guilty as a conclusion of law. It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged, and if he is withstood, his authority and purpose being made known, he may use the force necessary to overcome resistance and to the extent of taking life if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously or to such a degree as amounts to a wanton abuse of authority that criminal liability will be imputed. The same rule prevails when an officer has a prisoner under lawful arrest and the latter makes forcible effort to free himself; and, in this jurisdiction, the position holds whether the offense charged be a felony or a misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority and not dependent, therefore, on the grade of the offense.

These views are in accord with numerous decisions of our Court in which the questions presented were directly considered as in *S. v. Sigman,* 106 N. C., 728; *S. v. McMahan,* 103 N. C., 379; *S. v. Pugh,* 101 N. C., 737; *S. v. McNinch,* 90 N. C., 695; *S. v. Garrett,* 60 N. C., 144; *S. v. Stallcup,* 24 N. C., 50. In *S. v. Sigman* the principle is stated and approved as follows:

"If an officer is resisted in making an arrest he may use that degree of force which is necessary to the proper performance of his duty; and after an accused person is arrested, the officer is justified in the use of such force as may be necessary, even to taking life, to prevent his escape, whether the offense charged is a felony or misdemeanor."

In *S. v. McNinch:* "A police officer, in arresting one for violating a city ordinance, was indicted for an assault. The prosecutor alleged that the force used was excessive, and the judge charged the jury if such was the case the defendant was guilty, but failed to call their attention to the good faith in which the officer claims to have acted: *Held,* error. The amount of force necessary to make the arrest is left to the judgment of the officer when acting within the scope of his general powers and actuated by no ill-will or malice." In *S. v. Garrett* it was held, among things, "That where a defendant, in a State's warrant charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take the defendant, slew him, without resorting to unnecessary violence, it was held that he was justified." In *Sigman's case,* the officer was convicted of an assault but that was because the offense, being only a misdemeanor,

the defendant was fleeing from the officer to avoid arrest, the distinction and principle applicable being stated as follows:

"But where a person charged only with a misdemeanor flies from the officer to avoid arrest, the latter is not authorized to take life or shed blood in order to make the arrest. Under such circumstances, if he kills, he will at least be guilty of manslaughter, and he will be guilty of an assault if no actual injury is inflicted, if he uses such force as would have amounted to manslaughter had death ensued." And a similar ruling was approved in *Sossamon v. Cruse,* 133 N. C., 470, and in *S. v. Bryant,* 65 N. C., 327. In none of these was the question of resistance presented.

Considering the facts in evidence as testified to by defendant, it appears that the prosecutor, C. T. White, shown to be a violent and dangerous man when drinking, had been drunk and disorderly in the town of Aulander for several hours, intimidating its citizens, committing various violations of the town ordinances, including several breaches of the peace; that when defendant, the constable and chief of police, approached the prosecutor to arrest him, having a warrant for the purpose duly issued and of which the prosecutor was fully aware, the latter, in resistance, assaulted the officer with a drawn knife making it necessary to shoot the offender in order to subdue him and execute the process, and in view of the principles prevailing here, as stated, if this version of the occurrence is accepted by the jury, the action of the officer is fully justified. True, defendant testifies that he could have retired from the room and have avoided the difficulty "but that he did not want to run." While this at times may be the rule as between individuals, under the circumstances presented he was not required to "withdraw or to run." Charged, in a special sense, with conserving the peace and quiet of the town; having, as stated, a warrant commanding him to arrest the prosecutor, it was both his legal right and official duty to proceed according to the exigency of his writ and to exercise the force required to its efficient execution. A proper concept of the officer's duty in the premises is very well stated in one of the defendant's prayers for instructions, as follows: "The law does not require an officer with a warrant for an arrest for an offense to retreat or retire, but he must stand his ground and perform his duty; and it was not the duty of the defendant with the warrant for the arrest of the prosecutor, when the prosecutor advanced on him with the knife, if he did so, to back or retire, but it was his duty to stand and perform his duty and disarm the prosecutor, if it appeared to be necessary to do so, to effect the arrest."

On the record, there was error to defendant's prejudice and there must be a new trial of the cause.

Error.

STATE v. DAVE EVANS.

(Filed 28 March, 1919.)

1. **Homicide—Murder—Deadly Weapon—Malice—Intent—Affray—Evidence—Nonsuit—Trials.**

Evidence that the prisoner had personally threatened the deceased, for whose unlawful killing he was being tried, and had prepared himself therefor with a pistol; that the deceased went out to meet him, upon his return, with the wooden handle of a cant-hook, and having engaged in an affray was fired at three times by the prisoner, one or two of the shots having been fired as the deceased was retreating, is sufficient to infer any previous malicious intent on the part of the prisoner to kill the deceased with the pistol, and to sustain a verdict of murder in the first degree; and there being also evidence sufficient to convict him of murder in the second degree, a motion for judgment as of nonsuit upon the evidence was properly denied. *S. v. Atwood*, 176 N. C., 704; *S. v. Crisp*, 170 N. C., 755; *S. v. Myrick*, 171 N. C., 788, and other like cases, cited, applied and approved.

2. **Appeal and Error—Instructions—Verdict—Harmless Error—Murder.**

Where there is evidence sufficient for the consideration of the jury for a conviction of the prisoner, being tried for homicide, of murder in both the first and second degree, error, if any committed by the trial judge, in instructing the jury upon the law relating to murder in the first degree is cured by the verdict convicting the prisoner of the lesser crime.

3. **Trials—Argument—Stenographer's Notes—Evidence.**

The solicitor, upon the trial of a homicide, may read the transcript of the evidence made by the official stenographer in the case appointed under the provision of the statute in contrasting the evidence of the State with that of the defendant and arguing to the jury inferences therefrom, and an objection on the ground that the cross-examination of witnesses had not been typewritten is untenable.

4. **Appeal and Error—Instruction—Trials—Argument—Race Prejudice.**

Where the solicitor, upon a trial for a homicide wherein the defendant was a colored man, has argued to the jury that a white man, who was a disinterested witness, had testified to certain facts, exception that his remark tended to prejudice the jury on account of race or color cannot be sustained, it appearing that the trial judge instructed the jury in strong and forceful language, among other things, that it would be "cowardly perjury" for them to be influenced by such consideration, which removed any prejudice, if any, that might otherwise have been caused. The charge of the court upon this subject is not objectionable.

5. **Appeal and Error—Objections and Exceptions—Trials—Ground for Objections.**

The appellant will be confined, on appeal, to the ground of objection stated on the trial, and where the exception is to the remarks of the solicitor to the jury upon the trial for a homicide, which were perfectly proper in one aspect, we cannot sustain an exception which was taken after the trial that they were prejudicial upon another ground.

ACTION tried before *Lyon, J.*, and a jury at August Term, 1918, of CUMBERLAND.

The prisoner was indicted for the murder of Vivian L. Bundy, and was convicted of murder in the second degree.

The State's evidence tended to show that Bundy, the deceased, was woods boss of a gang of sawmill hands, of whom the defendant, Dave Evans, was one. W. M. Dixon, paymaster and general manager of the mill, had loaned the defendant $2.50 the Saturday before and had told Bundy and Walker, who ran the sawmill, to get the checks for it when Evans came for settlement the following Saturday. The State's witness, R. T. Walker, testified: "The defendant worked out enough to pay back the $2.50, and Bundy asked Dave for his checks. Dave said he would give them to Mr. Dixon or pay him the money. Bundy said it was no use to do that as the others had given him their checks. Bundy told Dave three times to get out of the commissary; witness thought it was over with and went into the back part of the store. Dave picked up a bottle. Dave said, 'God damn him, I'll get him; he thinks he is the only bully around here.' Dave then left in his wagon in which there was sawdust. He lives about a mile and a half from the mill. He came back in a short time; he had a brick; the witness talked with him, and Dave gave him the checks. The witness told him he had better go off and not have any trouble about the matter, and Dave walked off. This was outside the commissary. When the witness went in Bundy asked him if he would be there a while, and Bundy went out. Bundy said, 'You've got a brick for me, have you?' and Bundy came back, picked up a cant hook, and went out. Witness heard three shots and went to the door to see what was the matter; he saw Bundy walking away when Dave shot him again; he heard three shots before he went to the door; Dixon was paymaster at the mill and Bundy woods boss; it was a new cant hook handle with no hook on it."

W. M. Dixon testified as follows: "He lives eight miles from Dunn and is general manager of the sawmill and saw part of the homicide; he was driving a Ford car, and as he turned in towards the mill he saw two men who seemed to be in combat, then he had to look at his car and heard a shot; looking up he saw smoke. Both men were in down position. He saw one of the men shoot again and again; the white man straightened up and started to run off timid-like, as though he was weak. He got off something like 25 or 30 feet from the other man and another shot was fired when Bundy was near the logs on the tramroad; the witness was then 60 or 70 yards from the main road; he saw Evans look back and start running down the tramroad. Bundy called to him, saying that he was dying, and came meeting him and told him to take him to the hospital as quick as he could. The witness told Bundy maybe he was not so bad off, and the witness jumped out of the car and helped Bundy in; he did not see the first shot; at the second shot

the men were a few feet apart, and the same at the third shot; he saw nothing in Bundy's hand when he threw up his arms; Bundy got off 30 or 40 feet at the fourth shot; the witness was then about 200 yards away from them; Bundy's back or left side was towards Evans when he shot the last time, Bunday having turned to the left to catch on the logs, and nearly all of the mill hands were at the store during the shooting."

N. H. McGeachy, sheriff of the county, testified that "he arrested defendant at his sister's house, and his sister had locked the doors and told him not to enter the house; Dave's pistol was under the pallet on which he was lying and three bullets had been shot out of it."

Dr. Parker testified that "there were three wounds in Bundy's body, one at the left nipple, which in his opinion went straight in for if it had ranged to the right it would have perforated the heart, and the heart was not perforated; one through the left forearm, which went straight through; and the third and last, in the left flank, and this ranged to the right making three perforations in the intestines. This wound in his opinion was the chief cause of Bundy's death."

There was evidence on the part of the prisoner tending to show, as it is correctly stated by the counsel of the prisoner, the following facts: "The deceased and the defendant were working at a sawmill of which W. M. Dixon was paymaster. Dixon had loaned defendant $2.50 which was due the day of the homicide. On being given his time checks deceased asked defendant for his checks, and he replied that he was going to give them to Mr. Dixon when he came. Deceased cursed defendant and ordered him out of the commissary. Evans went home after other checks. While eating dinner his wife called him and told him she heard a car going down the road which defendant thought was Mr. Dixon's, so he went on back to the mill to pay him, but found he had not arrived. He joined some of the other hands in throwing bricks at other bricks thrown in the air. R. T. Walker, who ran the sawmill, then came out of the commissary and defendant asked him about turning over the checks to Mr. Bundy, and defendant gave them to Walker, who went back in the commissary, when Bundy asked Walker if he would be there a while, and Bundy went out to defendant, and he and defendant talked together. Deceased cursed defendant and ran back in the commissary and got a cant hook handle and came out again. Defendant ran and deceased ran after him. Defendant ran 75 yards when deceased knocked him down with the cant hook handle, near a tramroad. Deceased ran by him and turned and came back and was striking defendant, who was on the ground. Defendant pulled out his pistol while on the ground and shot three times, and at the third shot Bundy had the handle drawn

back to strike again. Deceased had three bullet wounds. He died on Monday after the shooting on Saturday."

There was also evidence from which the jury might reasonably infer, if they believed it, that the prisoner, after the first colloquy with the deceased, went to his home, one and a half miles distant from the saw-mill, to get his pistol, having picked up the bottle, cursed the deceased, and sworn that he would get him; that he did get the pistol and returned in a short time to the mill, when the affray took place, the deceased using the cant hook, and the prisoner the pistol, and the jury might also have properly inferred that the prisoner acted with express malice, deliberation and premeditation, and that his purpose was to arm himself and then to return to the mill and provoke the fight, with the intent to slay the deceased when he had the chance.

The solicitor, in the course of his argument, was contrasting the evidence of the State with that of the prisoner, and in doing so stated that there was one disinterested white witness whose evidence should be believed, Mr. Dixon's; that it was not necessary to trust to memory as to what this witness said, for he had the typewritten evidence of the court stenographer's notes, which he would read. Upon objection, the court stated that the typewritten evidence had been handed to him by the court stenographer. Defendant again objected and excepted. The solicitor again proceeded to read to the jury from said papers a portion of Dixon's evidence, and again defendant objected and excepted. He also excepted for the further reason that it was incomplete in that only the notes of the direct evidence of the State's witnesses, Walker and Dixon, had been written out and not their cross-examination, nor the evidence of any other witness.

Several witnesses testified that the prisoner's character is bad, but the most of them stated that they had not heard anything against him until the other shooting affair, which occurred six months ago.

There was other evidence in the case not necessary to be now stated. The prisoner's testimony tended to show a clear case of self-defense, and this was admitted to be so by the Attorney-General in his brief and argument.

The court charged the jury, in part, as follows:

"The defendant, Dave Evans, is indicted for murder. There has been something said about his being a negro and the deceased a white man. I want to say to you, gentlemen of the jury, that it would be a sad day for North Carolina if, in the administration of the law, juries or courts would have two laws—one for the colored man and one for the white man. There is but one law known and recognized among the people of the State, and that law is administered the same for the white man as for the colored man, and the same for the colored man as for the

white man, and no brave man, under his oath, will permit the fact that the defendant is a colored man to influence his verdict one way or the other. Only a coward would be guilty of such cowardly perjury. As I have said to you, the defendant is indicted for murder, charged with the murder of Vivian L. Bundy, and every person charged with crime is presumed to be innocent until his guilt is proven, and the defendant in this case cannot be convicted unless the State satisfies you from the evidence of his guilt. The law of this State does not permit me to express, either directly or indirectly, to the jury an opinion upon the facts of the case, weight of the evidence, or the credibility of the witnesses. These are matters exclusively for the jury, and the court has not consciously done or said anything to influence you one way or the other. It is the duty of jurors to take the law from the court and the evidence from the witnesses. You are to determine what facts have been established by the evidence, and to such facts apply the rule of law given by the court, and return a verdict accordingly, regardless of consequences either to the State or to the defendant. There are four verdicts that you can render in this case: First, a verdict of murder in the first degree; second, a verdict of murder in the second degree; third, a verdict of manslaughter; and fourth, a verdict of not guilty."

The court then stated the facts of the case as the jury might find them to be, and explained the law fully and carefully, dwelling upon every phase of the testimony.

The jury found the prisoner guilty of murder in the second degree. Judgment, and appeal by him.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. C. Downing and Sinclair & Dye for defendant.

WALKER, J., after stating the case: The motion for a nonsuit was properly overruled. As we have said in our statement of the case, there was evidence upon which the jury might well have concluded that the prisoner was the aggressor in the quarrel with the deceased; that he went to his home for the purpose of getting his pistol and thereby preparing himself for the combat, so that he would have the advantage of his adversary, and that this was done with the purpose and intent of engaging in the fight and slaying the deceased at the first opportunity. He was willing and ready for the fray, and entered into it with deadly purpose. But the jury, it seems, took the lenient view and convicted him of the lesser crime. There being ample evidence of murder and of manslaughter, the assignment of error, which is based upon the allegation that there was none, cannot be sustained.

The first, second, seventh, eighth, eleventh, thirteenth and fourteenth

exceptions assign errors in the rulings or the charge, relating solely to murder in the first degree, but the prisoner was acquitted of this offense, and therefore error, if there was any, proved to be harmless. *S. v. Bryson,* 173 N. C., 803; *S. v. McCourry,* 128 N. C., 594; *S. v. Casey,* 159 N. C., 472. If there was any error in respect to murder in the first degree it was favorable to the prisoner, as the charge did not, upon the facts to be inferred from the State's testimony, comply fully with the principle as stated in *S. v. Brittain,* 89 N. C., 481; *S. v. Garland,* 138 N. C., 675; *S. v. Kennedy,* 169 N. C., 326; Foster's Crown Law, p. 277, and the rule as formulated by *Lord Hale* and quoted by *Justice Ashe* in *S. v. Brittain, supra.* There may not have been any positive or affirmative error, even in favor of the prisoner, in this part of the charge, but the court made no distinct reference or application to the principle just stated, and we think there was evidence to warrant it. But, as has been said, if there was error in this respect the prisoner assuredly has no reason to complain of it.

The exception as to the remarks of the solicitor is without merit. He had the right to refer to the evidence in his argument for the sake of greater accuracy. The notes of the evidence were taken by an official stenographer appointed under the authority given by a statute, and it will be presumed at least *prima facie,* and in the absence of any showing to the contrary, that they were correct. There is no suggestion that they were not, but the ground of objection is that the cross-examination had not been typewritten. There is no proof that the solicitor misquoted the testimony, but every reason to believe that he did not. He was careful of the prisoner's rights and would not trust to his own memory, but, to be just to the prisoner, he referred to the notes as a safer and more reliable source from which to draw an accurate reproduction of what the witness had said, using his own language. There was nothing wrong in this. The court correctly instructed the jury as to how they should pass upon the evidence, as follows: "These, weight of evidence and credibility of witnesses, are matters exclusively for the jury, and the court has not consciously done or said anything to influence you one way or the other. It is the duty of jurors to take the law from the court *and the evidence from the witnesses. You are to determine what facts have been established by the evidence."* (Italics ours.)

If the solicitor should not have attached more importance to the testimony of the witness W. M. Dixon because he was a white man, and thereby drawn the color line, as the prisoner's counsel contended, the court very fully and in emphatic language counteracted any prejudice that could have been engendered thereby, even to the extent of telling the jury that it would be "cowardly perjury" to be influenced by such a consideration. We have no idea that the solicitor intended to arouse

any prejudice against the prisoner by his remark. The word was incidentally used rather than intentionally or designedly. The point was that his only witness to the material part of the transaction, who had a clear view of the scene of the tragedy, happened to be a white man who was entirely disinterested. But if there was any evil in the argument, as drawing the color line, the court swept it from the case by his trenchant reference to it. In the administration of the law by the courts of this State, every citizen stands upon an equality before the bar of justice, and the judge so stated. It may be further said that the objection to the remarks of the solicitor were general and there were two distinct propositions, the exception to one of which we have already overruled. *S. v. Ledford,* 133 N. C., 714; *Quelch v. Futch,* 175 N. C., 694; *Caldwell County v. George,* 176 N. C., 602. The ground of objection, based upon drawing the color line, was not distinctly assigned until the brief of the prisoner's counsel was filed. The court had the right to infer from the form of the objection, when first taken, and the same inference also is to be drawn from the assignment of error, that the sole ground of objection was to the reading of the typewritten notes of the witness' testimony. The objection, therefore, comes substantially within the rule that an appellant is restricted to the ground of objection to evidence stated below. *Kidder v. McIlhenny,* 81 N. C., 123; *Rollins v. Henry,* 78 N. C., 342; *Ludwick v. Penny,* 158 N. C., 104, and also within the rule stated in *S. v. Tyson,* 133 N. C., at p. 699, where we said that a party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant—not those who sleep upon their rights. He who would save his rights must be prompt in asserting them. We do not think, in the most favorable view to be taken for the prisoner in the present case, that there was any such abuse of the judge's discretion, if there was any at all, to require a reversal. "The conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly

abuse their privilege at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the case, it is not his duty to do so in the sense that his failure to act at the time, or to caution the jury in his charge, will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objection must be entered at least before the verdict." *S. v. Tyson,* 133 N. C., at p. 698; *Knight v. Houghtaling,* 85 N. C., 17. The trial was perfectly fair and impartial, and the verdict was fully justified by the evidence. There is not the slightest appearance of prejudice or bias, but, on the contrary, it would seem that the jury was merciful to the prisoner.

The charge of the court covered the entire case, in every phase of it, and the instructions were correct and in accordance with the most approved precedents. It was not only an adequate charge, but in all essential respects an excellent one. If there was any defect, there was none which prejudiced the prisoner's case in the least degree.

1. A killing with a deadly weapon, admitted or proven, requires the prisoner to satisfy the jury as to the existence of all matters of mitigation or excuse relied on by him. The latest applications of this doctrine are to be found in *S. v. Atwood,* 176 N. C., 704; *S. v. Johnson, idem.,* 722, where the authorities are collected.

2. Manslaughter is the unlawful killing of another without malice, an instance of the crime so defined being where one unlawfully kills another by reason of the anger suddenly aroused by provocation, which the law deems sufficient; the anger being naturally aroused from such provocation and the killing being done before time has elapsed for passion to subside and reason to resume its sway. *S. v. Merrick,* 171 N. C., 788, and cases there cited.

3. The legal effect of "beginning the fight willingly" and "cooling time" have been recently elaborately discussed in *S. v. Kennedy,* 169 N. C., 326, and in *S. v. Crisp,* 170 N. C., 785.

These principles were all fully explained to the jury, and all others pertinent to the case on this appeal. The doctrine of reasonable doubt was correctly stated and applied, and the jury could not have misunderstood the law in regard to it.

The prisoner has no reason to complain of the verdict. He had threatened the deceased upon trivial grounds, saying that he would show him "that he was not the only bully around here," and he cursed him with the imprecation "God damn him, I will get him," and immediately left the mill, riding to his home in a wagon and procuring his pistol,

which he concealed, and returning to execute his threat "that he would get him," the deceased, which he so quickly did. This may not be true, and the prisoner's version may be the right one, but there was sufficient evidence for a finding that it was true. If so, the prisoner fought, not upon a principle of self-defense, but from malice preconceived, and with a definite intent to kill when he engaged in the fight, which, as the testimony shows, he did willingly, if not eagerly. He first secured to himself the safer side of the contemplated affray by arming himself beforehand with a deadly weapon, and then proceeded to the field of the conflict, where the second quarrel occurred, which he must have been seeking, and there did his deadly work. It is like *S. v. Hogue,* 51 N. C., 381, 384, where *Chief Justice Pearson* says for the Court: "The deceased committed a violent assault upon the prisoner as he entered the room. This was legal provocation, and if the case stopped there the killing would be manslaughter, and the character of the deceased as a quiet or violent man would be immaterial; but the case did not stop there for the jury, under instructions of which the prisoner has no right to complain, find that he killed 'of his malice forethought,' that he had formed the deadly purpose, prepared the weapon, and sought that particular time and place to do the deed. So the character of the deceased was immaterial. It is surely murder to kill with malice, express or aforethought, no matter how violent or wicked the deceased may be. His Honor laid down one proposition which we think too favorable to the prisoner, and it is referred to lest it may mislead. It assumes that the prisoner 'had prepared a deadly weapon with an intention to use it in case he got into a fight with the deceased, and went into the dining-room for the purpose of meeting with the deceased, and with the expectation of having a conflict with him,' and the killing is held to be manslaughter. Killing under these circumstances would be murder, because of the preconceived malice, although the deceased made the first assault," citing *S. v. Martin,* 24 N. C., 101.

It is true the deceased had a cant hook, which is a wooden lever with a movable iron hook near the end, used for canting or turning over logs, but according to *Hogue's case* this does not relieve the prisoner of all guilt or necessarily mitigate the guilt of murder. He fought with malice and a purpose to slay the deceased if he got the chance, and not in self-defense, so the jury found, and there was ample evidence of the fact.

There also was evidence—and, too, strong evidence—that his purpose to kill was preconceived, premeditatedly and deliberately formed, but the jury, as we have said, gave the prisoner the benefit of the doubt as to this feature of the case, and acquitted him of murder in the first degree, and convicted him only of slaying the deceased with malice.

We may add that we commend the charge of the court as to race

prejudice. It was proper, even though exception was not properly taken, that the jury should have been fully cautioned against the influence of all prejudice. There is but one law, as he stated, for all citizens, and our judges have always been careful to guard against any prejudice, if it exists, on account of racial antipathies. We do not believe such prejudice exists, and our records show that it does not. Our judges will be prompt, as they have been, to eradicate all such evil considerations from the jury box which are calculated to poison the fountain of truth and prevent even and exact justice to all men of whatever state, race or persuasion. We have striven to this end persistently, and will continue to do so whenever necessary. The presiding judge did not too strongly denounce a juror who would be swayed by any bad motive to do wrong by preventing justice and corrupting his verdict.

Our conclusion is that no error is disclosed by the record.

No error.

STATE v. WILL DAVIS.

(Filed 9 April, 1919.)

1. **Murder — Evidence — Highway Robbery—Mob—Unlawful Purpose—Res Gestae.**

Where there is evidence that the prisoner, on trial for murder, was in a crowd at night organized for the purpose of committing highway robbery, and that after the mob had held up an automobile in which the deceased was riding, the prisoner deliberately and premeditatedly shot and killed him without provocation, it is unnecessary to show that the prisoner himself had joined in with the cry of the mob, "Let's stop him," in order to make such exclamations competent on the trial, such being indicative of the unlawful purpose of the crowd with which he was acting, tending to show the *quo animo* of their actions and being a part of the *res gestæ*.

2. **Same—Intermediate—Declarations—Continuous Transactions.**

Where there is evidence tending to show that the deceased was a member of a crowd assembled for the unlawful purpose of committing highway robbery at night, and that after the mob had held up a passenger in an automobile the prisoner deliberately and premeditatedly shot and killed him with a pistol, without provocation, it is not necessary to show that the prisoner was personally present at an intermediate time and had joined in with the cry halting the deceased, as such is within the *res gestæ*, being a part of the whole transaction of a connected and continuous nature from beginning to end.

3. **Courts — Superior Courts — Adjournments—Order of Judge—Sheriffs—Statutes—Validity of Trials.—Murder.**

Where the term of office of a Superior Court judge expires two days after the commencement of a term of court which his predecessor would

otherwise have held, it is proper for the retiring judge not to appear, and for his successor to notify the sheriff of the county to adjourn the court from day to day for four days until he could qualify, though the sheriff may himself thus exercise the authority given him by statute; and objection to the validity of a trial for murder on that gruond is untenable. *S. v. Wood*, 175 N. C., 809; *S. v. Hardin, infra.*, and *S. v. Simmerson, infra.*, cited and approved.

ACTION tried before *Bryson, J.*, and a jury at the December Term, 1918, of FORSYTH.

The prisoner was indicted for the murder of Charles White.

In order to understand the questions presented to this Court, it will be necessary only to state a portion of the testimony of Jacob Jackson, a witness for the State, and the assignments of errors, as follows:

Jacob Jackson testified: "On 17 November, 1918, in the evening, I was standing on Depot Street, in front of Cook's Cafe, and a crowd of about fifty or seventy-five people came by, defendant Will Davis being in the crowd, and they made me come with them on down Fifth Street, and just after crossing the railroad they held up one car, and the man in the car said he was a doctor and the crowd let him go on by. They went on down to Fifth and Linden streets and another car came down the hill, and they stopped it; three men went to the middle of the street and stopped the car. Will Davis was one of the three. One of the fellows had on a big overcoat and the other one was a soldier boy named 'Red,' that being all I know of his name. I do not know the man who had on the big overcoat nor do I know who was in front when they stopped the doctor's car, but after stopping that car the crowd went about as far as from me to the end of the courthouse, until they stopped the car that the man was shot in. The car in which the man was shot was coming towards town and down the hill, and the lights on the car were burning. They saw the car coming over the hill and said, 'Let's stop him.' (The prisoner objected to what was said, unless prisoner said it. Objection overruled; exception by prisoner.) They waited until the car got very near to them and then Will Davis, the man with the big overcoat on, and the soldier named 'Red' stepped out in the street in front of the car and stopped it. There were two men in the car. Mr. White was at the steering wheel. They made the other man get out of the car until they searched the car and got what they wanted out of it, and then made the man get back in the car. Mr. White said, 'I am the electric light man, let me by.' Some of the boys said 'Let him by,' and others said 'Don't let him by,' and about that time a pistol fired, and the man in the car hollered that he was shot. After these three men got in front of the car and stopped it, Will Davis went on the south side of the car, which was the same side Mr. White was sitting

on, the man that was shot, and Will Davis put his gun right through the ribs or arms of the top of the car—the top being up—right at White's side, and the shot was fired, and as the car drove away all of them—I reckon all of them that had pistols—commenced shooting at the car. I have been knowing Will Davis for about a year. I never saw defendant Jim Scales in the crowd that night as I know of; I didn't know him. Immediately after Mr. White was shot the crowd went on up the street and held up another man, but I do not know who the man was; the distance from where they held up Mr. White to where they held up the other man was about as far as from witness stand to back end of courthouse. Then the crowd went on towards Jordan's store and stopped on the corner of Fifth Street and Highland Avenue, right under the light."

Under the evidence and the charge of the court, to which there was no exception, the jury convicted the prisoner, Will Davis, of murder in the first degree. He was sentenced to death and appealed from the judgment, assigning the following errors.

"1. The court erred in overruling the prisoner's objection and allowing the witness, Jacob Jackson, to testify that some one in the crowd, seeing a car approaching, said, 'Let's stop him,' as shown by the prisoner's first exception.

"2. There was error in overruling the prisoner's objection and allowing the witness, Jeff H. Jackson, to testify that some one in the crowd of colored people said 'We'll get him,' as shown by the prisoner's second exception.

"3. There was error in allowing the witness, John C. Ayers, to testify in regard to an assault made upon him by Jim Scales, over the objection of the prisoner, when there was no evidence that this defendant had anything to do with the assault on Ayers or that he was in the crowd at that time, as shown by the prisoner's third exception.

"4. There was error in allowing the witness, Ed. Gordon, to testify, over the prisoner's objection, that a crowd was coming up Fifth Street and they said 'Halt,' as there was no evidence that this defendant was in the crowd at that time, as shown by prisoner's fourth exception."

By consent of the solicitor, a verdict of not guilty was returned as to James Scales.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel for defendant.

WALKER, J., after stating the case: There was plenary evidence to show that the prisoner shot the deceased, inflicting a mortal wound

from which he died. The charge of the court upon all the different phases of the case was exhaustive and correct in every particular, and there is no exception to it. We will proceed, therefore, to consider the questions of evidence.

1. There is a slight error of fact in this assignment of error, as the witness Jacob Jackson stated, not that "some one in the crowd said 'Let's hold him,' but that 'they,' meaning, of course, the crowd, said so. But, assuming that he had referred to only some one in the crowd, the evidence was competent, and what we say here covers the second assignment of error." For the purpose of showing the admissibility of this evidence we may well refer to *Saunders v. Gilbert,* 156 N. C., 463, at pages 470 and 471. In that case it appeared that many persons had gathered in the street and followed the plaintiff to his home, where they stopped in front of his house, some or all of them using abusive and threatening language. The question arose in the trial below, whether these outcries of this mob or unlawful assembly were competent against each and every one of the crowd. With regard to this, we said: "The testimony as to what was said in the road and in front of the plaintiff's home was clearly competent. The *res gestæ* includes what was said as well as what was done. The acts and the outcries of this unlawful assembly—for that is, in plain speech and in law, what it was—is held to be competent as *pars rei gestæ,* and also as tending to show their purpose or *quo animo.* Nothing is better settled than this rule of evidence. *S. v. Rawls,* 65 N. C., 334; *S. v. Worthington,* 64 N. C., 594. We find it stated in 4 Elliott on Evidence, sec. 3128, that 'What is said and done by persons during the time they are engaged in a riot (or unlawful assembly) constitutes the *res gestæ,* and it is, of course, competent, as a rule, to prove all that is said and done'—the acts and words of the mob or any members of it, as in *Rex v. Gordon,* 21 State Trials, 485 (563), wherein evidence of the cries of the mob 'No Popery,' as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ.*" This would seem to be a full answer to these objections. The same rule of evidence had been before stated and applied by us in *Henderson-Snyder Co. v. Polk,* 149 N. C., 104, 107. We there held that where two prisoners are engaged together in the execution of a common design to defraud others, the declarations of each relating to the enterprise and in furtherance of it, are evidence against the other, though made in the latter's absence, if a common design has been shown, citing *Lincoln v. Chaplin,* 7 Wallace (U. S.), 132. It is, perhaps, the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his co-conspirators. This rule has been more aptly stated as

follows: "The law undoubtedly is, that where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ,* may be given in evidence against the other." The principle on which the declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is that, by the act of conspiring together, the conspirators have jointly assumed to themselves as a body the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by one, in furtherance of that design, a part of the *res gestæ,* and therefore the act of all. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. 4 Elliott on Evidence, sec. 2939, citing *Card v. State,* 109 Ind., 415; *Cuyler v. McCarthey,* 40 N. Y., 221; *S. v. George,* 29 N. C., 327; *Cabiness v. Martin,* 15 N. C., at p. 110. See, also, Lockhart on Evidence, sec. 210; *Blair v. Brown,* 116 N. C., 631. This doctrine as to the competency of the cry or exclamation of a mob, or any one of the mob, while it is in the prosecution of its illegal design or purpose, has been of long standing, and was certainly established in the proceedings against Lord George Gordon for high treason, when such evidence was freely admitted by *Lord Mansfield* and his associates on the King's Bench, *Justices Willes, Ashurst* and *Buller,* who presided at the hearing of that celebrated case (21 St. Trials, 486), for the same riot, so graphically described by Charles Dickens in his Barnaby Rudge.

2. As to the third and fourth assignments, we must hold that there was evidence that the prisoner was with the rioters when the assault was committed on John C. Ayers, and also when they were marching on Fifth Street and crying "Halt." These events were but a part of one whole transaction, which was continuous in its nature and essence from beginning to end, and what was said or done by the mob or any of its members was competent to show its unlawful character and motives. It was held, in a case resembling this one in its principal features, that acts and circumstances forming a continuation of the main transaction are admissible as *pars res gestæ. Floyd v. State,* 143 Ga., 286. The several events occurring, one after the other, in close and connected succession, must be viewed as linked together for one purpose, which was a bad one as tending to a breach of the public peace and to strike terror into the travelers on the highway, who had the right to go their way without molestation or being made afraid. It had for its purpose even more than that evil design, it aimed actually not only to terrify but to commit highway robbery, or murder if need

be, in order to gratify its fiendish and wanton desire. It was regardless of every duty it owed to society, and fatally bent on mischief. While in the execution of their illegal and high-handed purpose, to hold that any outcry from this band of marauders is not admissible as evidence against each one of them would violate a rule of the law too well established, founded as it is upon a just and adequate reason, to be set at naught where it applies so aptly. Dr. Wharton, in his excellent treatise on Evidence, has said: "If in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision are confined within the few moments that it occupies. When again there is a social feud in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestæ* as the blows given in homicides for which particular prosecutions may be brought." 1 Wharton on Evidence, sec. 258; *R. R. v. Herrick,* 49 Ohio St., 25; *Small v. Williams,* 87 Ga., 681; *Linck v. Vorhauer,* 104 Mo. App., 368.

2 Jones on Ev., sec. 347, states that in such cases the declarations have been received on the ground that they were but parts of a *continuous act,* which showed the intention of the person or persons whose motives were in question, and as explanatory of the act. The rule in this respect is well stated in *Mutual Life Ins. Co. v. Hillman,* 145 U. S., 285: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." And it is also said that from whatever point of view a given circumstance is regarded in connection with its admissibility as one of the *res gestæ,* it is absolutely essential that the claim shall be founded on its being one of the immediate family of facts which relevantly constitute the real subject matter. Does it belong to it, or has it only a distant relation and relevancy. If it is not part, then the admissibility, if at all, must be based on ground other than that of *res gestæ.* Although, as we have seen, different tribunals do not agree as to the degree of strictness or liberality with which they apply the rule that the declaration should

be contemporaneous with the transaction in issue, there is no doubt but that the declaration must be a *part of such transaction*, and that it must illustrate or explain it. The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction, of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of coexisting motives. These declarations, especially when in the form of instantaneous or contemporaneous outcries or exclamations, are admitted as evidence upon the idea that they are natural and spontaneous utterances, which are prompted by no intention to suppress or conceal the truth, the declarant having no opportunity for deliberation or the fabrication of evidence. This kind of proof is not only very persuasive, but nearly always very convincing in its probative force.

In any view we can fairly take of this case and the court's ruling, we find that the trial was entirely free from errors, and that the prisoner's rights have been fully protected. The charge of the court was a remarkably clear, accurate and forceful one.

The question whether Judge Bryson had lawful authority to preside over the court in which the prisoner was tried and convicted, has been fully considered and decided against the prisoner's contention at this term in *S. v. Harden and Beale, post,* 580, and *S. v. Simmerson, ante,* 545, and no further discussion would seem to be necessary. It may be well to state, though, that Judge Lane acted properly and discreetly in abstaining from attendance at the court, as there were only two days for him to preside (30 and 31 December), because Judge Bryson's term commenced on the third day, 1 January, 1919, when he duly qualified and was ready to proceed with the business of the court. Judge Bryson acted properly in notifying the sheriff to adjourn the court from day to day for four days, until he could qualify and appear to hold the court, although the sheriff had the power, under the statute, to do this without any notice. *S. v. Wood,* 175 N. C., 809. That case decides the principal question involved here as to the power of Judge Bryson, as there it was held:

"1. The provision that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done 'unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term,' which implies the power of the judge to order an adjournment to a later day in the term. Rev., sec. 1510.

"2. Where the sheriff has not continued a term of the Superior Court for the absence of the judge to hold the same, the judge may appear

at any day within the term, and the proceedings thereafter will be valid. Rev., sec. 1510. (If the sheriff had not already adjourned the term under the statute.)

"3. Where the judge of the district is prevented from holding a term of court, as in case of detention by a trial in another county extending over into such term, the Governor may designate and appoint another judge to hold such term, or a part thereof, though within the same district, and by virtue of his commission he is a judge both *de facto* and *de jure* while so acting."

No error.

STATE *v.* TOM HARDEN AND ARTHUR BEALE.

(Filed 9 April, 1919.)

1. **Evidence, Exclusion—Courts—Inadvertence—Appeal and Error—Objections and Exceptions.**

Where evidence has been admitted on the trial and afterwards excluded by the trial judge as incompetent, and the jury so instructed, his inadvertently referring to it in his charge without instruction thereon should be called to his attention at the time to afford him an opportunity for correction.

2. **Criminal Law—Evidence—Collective Facts—Incriminating Conduct.**

Testimony of a witness upon whom the defendants were being tried for assault and battery, that they did not know each other at the time, and that the defendants entered a store soon after the occurrence, when he was calling a policeman by phone and "seemed surprised to see him there," is competent as one of a variety of facts presented to the senses at one and the same time (*S. v. Spencer*, 176 N. C., 712) and was a relevant circumstance for the jury to consider as tending to show their guilt by their action and conduct.

3. **Courts—Terms—Adjournments—Retiring Judge—Sheriffs—Statutes.**

Where a newly elected judge, as successor to one who was to have held the term of a court commencing on 30 December, continuing for several weeks, and designated by the statute as a Spring Term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days (which right the sheriff himself has under the statute, Rev., 1510), to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer *de jure*. And if not, they are valid as those of an officer *de facto*, and an exception to the validity of a trial of an action on that ground is untenable.

INDICTMENT for highway robbery, tried before *Bryson, J.*, and a jury at Spring Term, 1919, of FORSYTH. Defendants were convicted, sentenced and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Hastings & Whicker for Arthur Beale, Fred M. Parrish for Tom Harden, defendants.

WALKER, J. The State's witness, A. J. Edwards, upon whom the assault and robbery were committed, during the course of his testimony stated that about ten or fifteen minutes after the robbery he was in George Anderson's store, telephoning for a policeman, when defendants entered the store (and seemed surprised to see him there). The last part of this testimony, which we have enclosed in parenthesis, was excluded by the court on objection by defendants, but in stating the evidence and contentions to the jury the learned judge inadvertently referred to it, but gave no instruction in regard to it in his general charge, though at the time it was ruled out the judge told the jury they should not consider it. The reference to this statement of Edwards is now assigned as error.

It is evident that the reference to the excluded statement was made by mistake, and should have been called to the court's attention at the time, so that it might then be corrected. We have repeatedly held that this should be done when the judge is reciting the evidence or the contentions of the parties. *S. v. Spencer,* 176 N. C., 709, is the most recent case settling this question, and it cites *S. v. Blackwell,* 162 N. C., 672; *S. v. Martin,* 173 N. C., 808; *S. v. Burton* 172 N. C., 939, there being numerous cases both before and since they were decided.

But the evidence was competent, as held in *S. v. Spencer, supra.* The surprise or confused appearance of the defendants was natural evidence. A man may show his guilt by his action or conduct, as well as by his words. The witness did not know the defendants before he was robbed, and when they first entered the store he inquired of Van Surratt and Emma Anderson who they were. If he did not know them and they did not know him, there was no reason for them to be surprised at seeing him in the store. The fact that they were surprised is therefore a proper and relevant circumstance for the jury to consider. Whether they were surprised is also for them to determine. We said in *S. v. Spencer,* 176 N. C., at p. 712: "The instantaneous conclusions of the mind as to appearance, condition, mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact and are admissible in evidence. *S. v. Leak,* 156 N. C., 643; *Renn v. R. R.,* 170 N. C., 128. Within this rule, the opinion of the witness as to the appearance of the dog and his conduct was permissible." If the defendants exhibited surprise by their conduct, it was because they had been with the witness, George Edwards, and recognized him as the victim of their robbery, or rather it is a fair and reasonable

inference for a jury to draw. *Judge Gaston* said, in *S. v. Swink,* 19 N. C., 9 (which was approved in *S. v. Rowe,* 98 N. C., 629, and *S. v. Spencer, supra*): "All the surrounding facts of a transaction may be submitted to the jury when they afford any fair presumption or inference as to the question in dispute. Upon this principle it is that the conduct of the accused at the time of the offense or after being charged with it, such as flight, the fabrication of false and contradictory statements, the concealment of the instruments of violence, the destruction or removal of proofs tending to show that an offense had been committed or to ascertain the offender, are all receivable in evidence as circumstances connected with and throwing light upon the question of imputed guilt." *S. v. Hastings,* 86 N. C., 596. We are of the opinion that the defendants were properly tried, and that the evidence fully sustains the verdict and judgment.

The right of Judge Bryson to preside at the court is questioned by an exception of the defendants, but we think without sound reason. We will briefly state the facts: The Court Calendar in that judicial district is based upon two fixed periods of the year—the first Monday of March for the spring ridings, and the first Monday in September for the fall ridings, and the courts are required to be held commencing on those days or on a certain designated number of Mondays before and after, for each of the counties in rotation. The Public Laws of 1917, ch. 169, provided that the particular court in question should commence on the ninth Monday before the first Monday in March which, it so happened, fell upon 30 December, 1918, the first week being for the trial of civil cases, there being three weeks of the term. Judge Lane had presided at the Fall Terms of 1918 of Forsyth Superior Court, and the contention of the defendants is that he should have held the court at which they were tried and convicted. Judge Bryson was elected for the Twentieth Judicial District, and was commissioned and duly qualified as such, and assigned by statute to hold the courts of the Eleventh District. When his right to hold the court was challenged, he made and ordered to be entered in the minutes the following findings: "That the term of Superior Court for Forsyth County, at which the defendants were tried and convicted, was the regular term of court fixed by the statute, beginning upon 30 December, 1918, and continuing for a term of three weeks. That no judge appearing upon Monday, 30 December, 1918, it was the duty of the sheriff of said county, in compliance with the law, to open said court and adjourn the same from day to day for the first four days of said term. That the adjournment of said court on Monday and Tuesday by said Sheriff Flynt was in compliance with the statute, and that the direction to the sheriff by wire from Judge Bryson, who was assigned by statute to hold the courts of the Eleventh

Judicial District of North Carolina, for the Spring Term of 1919, was lawful and in compliance with the statute, and that the said court was legal and properly constituted."

It appears, therefore, that as no other judge was present on the first Monday of court, it was adjourned by the sheriff from day to day, under Rev., sec. 1510, and Judge Bryson "being present" before sunset of the fourth day of the court, he organized the same and proceeded with the trial of causes, and the transaction of the other business of the court. This was all regular and within the intent and spirit of the statute, even if not within its letter, and we have so held in *S. v. McGimsey,* 80 N. C., 377. Under the statute and that case the sheriff could have adjourned the court from day to day, until the fourth day, without any special order from the judge, as he is so directed to do by the statute itself, and in *Norwood v. Thorp,* 64 N. C., 682, it was said: "The provision of the Code of Civil Procedure, sec. 396 (Revisal of 1905, sec. 1510), that where the judge fails to appear at any term until the fourth day thereof, inclusive, the sheriff shall adjourn the court until the next term, does not avoid the acts of any term where, upon the nonappearance of the judge, the sheriff did not in fact adjourn the court, and the judge afterwards (here, in the second week) actually appeared and held court." Judge Bryson appeared immediately after he was inducted into office, and we are clearly of the opinion that he rightfully presided at the court, and all of its proceedings thereafter taken were valid, and that he was judge of the court *de jure.* The record sets forth that a regular term of the Superior Court was opened and held Wednesday, instead of the Monday preceding, fixed by the statute as the first day, and it has been held by us that upon this recited fact the presumption is that the sheriff adjourned the court from day to day, as he is required to do by the statute, and that the court was legally held and its proceedings were valid. *S. v. Weaver,* 104 N. C., 758, where *Justice Avery* said: "The record of the term at which the case was tried before Judge Bynum sets forth that 'at a Superior Court, convened and held in and for the county of Granville and State of North Carolina, at the courthouse thereof in Oxford, on Wednesday, 24 April, 1889, present,' etc. It is contended by counsel that the fact that the court appears to have been first opened on Wednesday is fatal to the jurisdiction. The sheriff is required by section 926 of The Code to 'adjourn the court from day to day until the fourth day of the term, inclusive,' etc., if the judge of the Superior Court shall not be present. It was therefore lawful to open the court as late as Thursday, and it must be presumed that it was adjourned from day to day, as the law directs, by the sheriff."

In any view of the matter, Judge Bryson was a *de facto* officer, and his acts were valid as such so far at least as the public and third persons

are concerned. This was expressly held in *S. v. Lewis,* 107 N. C., 967, 970, where the question is fully discussed by *Justice Avery.* Our case is certainly within the third rule stated by *Chief Justice Butler* in *S. v. Carroll,* 38 Conn., 449, which authority was cited with approval in the *Lewis case,* where *Justice Avery* said: "If Judge Whitaker was acting either *de jure* or *de facto* as judge of the Superior Court of Rockingham County in opening and organizing that court, and in presiding at the trial of the defendant until the jury returned a verdict of guilty, it was error to allow the motion of the defendant and enter the order arresting the judgment. Were we to concede not only that the Governor did not have the power, under the Constitution, to appoint him and clothe him with the rightful authority, but that his acts as a *de facto* officer also ceased to be valid and binding as to the public and third persons, when he declared in open court his purpose to abdicate because he was of opinion that the said term could not have been lawfully held except by a successor regularly appointed and commissioned by the Governor to fill the vacancy caused by the death of Judge Shipp, still his refusal to proceed further with the business of the court would not affect the validity of any previous act done under color of his appointment from the Governor, and when he was holding himself out to the public as the rightful incumbent by virtue of the special commission entered of record. Judge Whitaker was a *de facto* officer so long as he continued to preside and to assert his power under and by virtue of the commission issued by the Governor, even if we concede, for the sake of argument, that he was not the rightfully constituted judge of the Superior Court of Rockingham County, and that his power as a *de facto* officer continued only so long as he exercised it." See, also *S. v. Hall,* 142 N. C., 710, which cites and approves *S. v. Lewis, supra; S. v. Speaks,* 95 N. C., 689; *Norfleet v. Staton,* 73 N. C., 546; *Burke v. Elliott,* 26 N. C., 360, and *Burton v. Patton,* 47 N. C., 124. We might rest this part of the case upon other reasons, but it is not necessary that we should do so, as we hold that Judge Bryson acted properly and rightly in opening and holding the court, and that his right to do so appertained to him as a *de jure* officer, designated by the law to hold this particular court, among others, in the district.

While the term of this court commenced in December, next before the last day of that month, it is specifically described by the statute as one of the Spring Courts in the year 1919, and must be regarded as such, the law having so provided in clear and explicit language.

A careful inspection of the record proper and case on appeal convinces us that no error has been committed.

No error.

STATE v. WALTER BUTLER.

(Filed 15 April, 1919.)

Intoxicating Liquors—Evidence—Character—Voluntary Answer of Witness—Sentences.

Where the character of the defendant, on trial for violating the statute against the sale of spirituous liquor, is in evidence a witness, who has testified that he knows the general character of the defendant, may voluntarily and in order to speak the truth testify in answer to a proper question that the defendant's character for selling whiskey is bad. The propriety of a road sentence for the violation of our prohibition statutes, instead of the State's sharing in the illegal profit by the imposition of a fine, discussed by CLARK, C. J.

APPEAL by defendant from *Shaw, J.*, at December Term, 1919, of GUILFORD.

Indictment for selling spirituous liquor. The defendant was found guilty and sentenced to eight months on the public roads, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. P. Bynum and R. C. Strudwick for defendant.

CLARK, C. J. The defendant introduced evidence to show his good character. The chief of police of Greensboro, Horace Foushee, witness for the State, was asked if he knew the general character of Walter Butler, and replied that he did. He was then asked, "What is it?" The witness replied, "It is bad for selling whiskey." The defendant's counsel objected to the answer and moved that it be stricken out as incompetent, and not responsive to the question. This the court declined to do, and the defendant excepted.

This is the only question presented by the appeal. The witness doubtless could not answer broadly that the defendant's character was bad. He was on oath and it was competent for him to state of his own motion, as he did, "It is bad for selling whiskey." He doubtless gave the only answer that his conscience permitted. The State could not ask whether it was bad or good for a particular offense, but the witness in the interest of truth could qualify his answer as he did. The witness could not say that the defendant's character was good. Doubtless he could not say it was bad, altogether. He therefore gave the only answer that he could. In the interest of the administration of justice and in the investigation of the truth of the charge before the court the answer could not be stricken out. The jury were entitled to the information.

This is plain, practical, common sense and it has been held too often to be questioned. In *S. v. Summers,* 173 N. C., 780, *Hoke, J.,* for the Court, said: "Objection is also made that the court refused to strike out the answer of certain other witnesses as to character, Dr. John R. Erwin and others, who, after saying they knew the character of defendant, qualified their further answer by saying in what respect it was bad. It is the accepted rule that a witness may do this of his own volition, and these exceptions also must be disallowed. *Edwards v. Price,* 162 N. C., 243; *S. v. Hairston,* 121 N. C., 579-582." In *S. v. Cathey,* 170 N. C., 794, the sheriff, in answer to the same question as to the general reputation of the defendant, replied, "It is bad for dealing in liquor." It was held by *Allen, J.,* that there was no error.

The State did not introduce evidence of particular acts of misconduct and asked only as to the defendant's general character. It was open to the witness, having stated that he knew the defendant's general character, to qualify and explain his answer as to what it was by saying it was bad for selling liquor.

The ruling of the judge is so well sustained upon reason and the authorities that doubtless the real ground of the appeal was objection to undergoing the sentence upon the public roads for eight months. The violation of the law in selling intoxicating liquors is deliberate, not impulsive, as is the case in regard to many offenses, and the motive is the large profits accruing from the contemptuous violation of the law. The imposition of fines in such cases in practice amounts to granting license by the courts upon payment by the culprit of a very small part of the illegal profits obtained. The law authorized the sentence imposed of imprisonment with leave to work upon the public roads.

Certainly the taking back by the State of a part of the profits made by violation of its laws can never repress the evil which is the object of the trial and punishment. In fact it puts the State in the more than questionable attitude of sharing with the criminal the profits derived from the deliberate violation of its own laws, and it is thus in effect a partner suing for a share in the proceeds of the illegal business. The fines imposed always give the State a very minor share in the illicit receipts. This is not the object to be sought by the courts. Such sentences should be imposed as will prevent the repetition of the offense by the defendant and all others offending in like manner.

No error.

STATE v. CHARLES BRADY.

(Filed 23 April, 1919.)

1. **Indictment—Criminal Law—Judgments—Motions—Arrest of Judgment—Defective Counts.**

   A general verdict of a jury convicting of a criminal offense will not be disturbed by motion in arrest of judgment on the ground of defective counts stated in the bill of indictment if others set out therein are good.

2. **Indictments—Criminal Law—Judgments—Motions—Arrest of Judgment—Evidence—Trials.**

   Substantial defects on the face of the indictment is the only ground upon which a motion in arrest of judgment can be sustained, and the court will not look to extrinsic evidence to ascertain the defects.

3. **Same—Instructions—Prayers for Instruction—Trials.**

   A failure of proof to sustain the counts in a bill of indictment should be taken advantage of by a prayer for special instruction, and not by motion in arrest of judgment on the verdict.

APPEAL by defendant from *Shaw, J.*, at the December Criminal Term, 1918, of GUILFORD.

The defendant was convicted on the following indictment:

"The jurors for the State, upon their oath, present that Charles R. Brady, late of the county of Guilford, on the twelfth day of January, in the year of our Lord one thousand nine hundred and eighteen, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously prescribe for one Polly St. Clair, she being pregnant or quick with child, to the knowledge of the said Charles R. Brady, certain medicine, drugs, or some substance, with intent thereby to destroy said child, the same not being necessary to save the life of said mother; the said Charles R. Brady not only prescribed the aforesaid medicine or drug, but procured the same and advised the said Polly St. Clair to take same, against the form of the statute in such cases made and provided and against the peace and dignity of the State.

BOWER, *Solicitor.*"

There was a verdict of guilty, and the defendant moved in arrest of judgment, which was overruled, and he excepted and appealed from the judgment pronounced on the verdict.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John A. Barringer attorney for defendant.

ALLEN, J. The defendant concedes that the first part of the indict-

ment, charging him with prescribing, is good, and he does not question the correctness of the principle that when there are two or more counts in an indictment, some good and others defective, that a general verdict of guilty will be upheld (*S. v. Klingman,* 172 N. C., 950), but he insists that there is no evidence that he prescribed medicine, etc., and as the procuring and advising are not properly charged, that the judgment ought to be arrested.

The difficulty with this position is that "the judgment in a criminal prosecution can only be arrested for defects in the bill of indictment when it shows substantial defects on its face. The court cannot look to extrinsic evidences to ascertain the defects." *S. v. Craige,* 89 N. C., 479.

The same question was presented in *S. v. Hawkins,* 155 N. C., 466, and the Court said, "If there had been a failure of proof, the defendant should have taken advantage of it by a prayer for instruction and not by a motion in arrest of judgment."

A prayer for instruction would not, however, have availed the defendant as we find in the record evidence that the defendant prescribed whiskey at one time and rat's bone and tablets at other times for the purpose of causing an abortion.

No error.

STATE v. JAMES COBLE.

(Filed 21 May, 1919.)

1. **Appeal and Error—Objections and Exceptions—Brief—Rules of Court.**
   Exceptions not set out in appellant's brief are deemed to have been abandoned on appeal. Rule 34.

2. **Homicide— Manslaughter— Instructions—Firearms—Recklessness—Self-Defense—Instructions.**
   Where a third person is killed while endeavoring to prevent a homicide which appeared imminent, and there is evidence that the combat was sudden, but the prisoner willingly entered into it and pointed a gun at his opponent while the latter was assaulting him with his hands, and that the gun fired while the deceased, having caught the gun barrel, was jerking it to prevent the homicide: *Held,* an instruction is proper under Revisal, sec. 3632, and the common law, from the wanton and reckless pointing and use of the gun by the prisoner; that if the prisoner willfully entered into and pursued the combat, resulting in the heat of passion in the death of the deceased, he would be guilty of manslaughter, and that to sustain a plea of self-defense it must be shown that the defendant was without fault in bringing on or provoking the difficulty, or that he had abandoned it after it was started, or that having retreated as far as he could have

done with safety he used the force that was apparently necessary under the circumstances.

ALLEN, J., dissenting.

APPEAL by defendant from *Lane, J.*, at January Criminal Term, 1919, of GUILFORD.

The defendant was indicted for murder in the first degree. At the beginning of the trial the solicitor stated in open court that he would ask a conviction only for murder in the second degree or of manslaughter.

The evidence is stated in the case settled upon agreement as follows: "James Greeson, on Christmas Day 1918, was running a small illicit still near his house in Guilford County. On the morning of that day Elwood Brothers and James Coble, the defendant, were present, looking on. They were taking no part whatever in the operation of the still. James Coble had with him, as usual, his old double-barreled gun. About 11 o'clock that day W. L. May, Henry Amick, the deceased, and Monroe Coble came to the said still. Some conversation took place between Henry Amick and James Coble. Henry Amick was joking and teasing James Coble about having gotten tight and hollering and shooting off his gun on former occasions. After a short time May, Monroe Coble, and Henry Amick left. About 5 o'clock that afternoon James Coble was at the house of James Greeson, when May, Monroe Coble, and Henry Amick again came to that place. James Coble had his gun. It was proven that it was his habit to carry his gun wherever he went, and there is no evidence that he had it along with him for any purpose of making trouble or using the same in a fight. Henry Amick also had a gun. Monroe Coble began to quarrel with James Coble, and invited him down into the woods to fight. James Coble refused to go. After some further words between Monroe Coble and James Coble, Monroe Coble cursed James Coble and said that he was going to 'bat his eyes out.' James Coble stepped back, the parties being ten or fifteen paces apart, and said, 'No you won't;' and the witness Elwood Brothers testified that James Coble cocked his gun but did not present it. That defendant then stepped back two or three steps, cocked his gun, pointed it at Monroe Coble, and at that time deceased ran in between defendant and Monroe Coble and said, 'No shooting here,' and caught hold of the end of the defendant's gun. Whereupon Monroe Coble rushed upon James Coble, striking at him with both hands, and Henry Amick, his gun in his hands, also rushed upon him. Amick passed Monroe Coble and caught hold of the barrel of James Coble's gun and jerked it violently three or four times. The gun was discharged and killed Henry Amick, and immediately he fell to the ground."

The defendant, James Coble, stated he did not say or do anything

to provoke the assault upon him by Monroe Coble; that he declined Monroe's invitation to go into the woods and fight; that he did not cock the gun; that he did not pull the trigger or discharge the gun, but that it was discharged by the violent wrenching and pulling the gun by Henry Amick; that it was old and frequently had gone off before accidentally.

The judge, in reciting the State's evidence, further says that "Coble had been asked to leave by Greeson." This appears from the context to have been Coble, the defendant, and not Monroe Coble, the man with whom he had a quarrel. The defendant was convicted of manslaughter and sentenced to two years in the State's Prison. Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. P. Bynum and R. C. Strudwick for defendant.

CLARK, C. J. The exceptions are to the refusal of a motion to nonsuit and to the following paragraphs in the charge: "Now if you should find beyond a reasonable doubt that a sudden quarrel arose between these men, and that in the heat of passion and in sudden fury because of things that were said to him by these other men or done to him, or by any combat which came on between them in which they engaged suddenly about matters, this defendant was at fault in entering into and fighting in combat willfully, fought willfully and wrongfully, that is, not in self-defense, and in the heat of passion slew the deceased, then you would return a verdict of guilty of manslaughter."

Also to the following charge: "Manslaughter may be committed also if a person by the careless, negligent use of a firearm, and in the presence of other persons, either through carelessness or negligence, wanton, reckless disregard of the safety of other persons, points a firearm at them and handles it in such reckless, negligent manner as that it is exploded and causes the death of another. That would be manslaughter, although no death may have been intended or injury intended."

And again to the following part of the charge: "Now a person cannot plead self-defense if they are at fault in bringing on the difficulty, by their own conduct in engaging in and bringing on the difficulty. If they cause another to assault them they cannot plead self-defense or if they enter into a combat or fight willingly or wrongfully. A person in order to plead self-defense must be without fault in bringing on or provoking the difficulty before he can justify the use of force, or he must in good faith abandon the difficulty after it has started, or retreat as far as he can with safety, and then he can turn and defend himself by using such force as is apparently necessary."

These four assignments of error are the only ones set out in the defendant's brief and the others therefore are abandoned. Rule 34, 174 N. C., 837. We find no error in either of these particulars.

This case differs from *S. v. Turnage,* 138 N. C., 566, for the judge here left the contention of the defendant that the gun was accidentally discharged to the jury, as appears in the charge as set out in the record, but in other respects the law in that case applies to this.

At common law and by Rev., 3632, one who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. *S. v. Stitt,* 146 N. C., 643. In *S. v. Turnage,* 138 N. C., 566, *supra,* the Court said: "Where the evidence is conflicting, or where the facts testified to are such that reasonable minds may draw different inferences therefrom, the case should be submitted to the jury, with appropriate instructions as to the law, together with the contentions of both sides arising on the evidence."

This was done by the judge in this case. In *S. v. Limerick,* 146 N. C., 651, *Hoke, J.,* says: "If the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of the deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental."

In *S. v. Trollinger,* 162 N. C., 619, there was no evidence of any ill-feeling between the parties. "There had been no fuss of any kind. The crowd was laughing and talking." Here the crowd was at an illicit still, all hands apparently drinking, and the defendant, James Coble, had prepared his gun to defend himself, according to his statement, from an attack which was about to be made upon him by Monroe Coble with his bare hands. This threat on the part of James to shoot Monroe was so imminent that the deceased, Henry Amick, rushed in between them crying out, "No shooting here." The deceased had a gun in his hand, but it is clear from the evidence that he made no attempt to use it. The witnesses do not make the transaction entirely clear, but the witness stated "Amick passed Monroe Coble and caught hold of the barrel of James Coble's gun and jerked it violently three or four times. The gun was discharged and killed Henry Amick, who immediately fell to the ground." The judge properly submitted the case to the jury. He could not have told them that the defendant was or was not guilty of manslaughter upon the evidence, which is that he pointed the gun at Monroe Coble.

The first two exceptions to the charge cannot be sustained. The

third paragraph of the charge excepted to is sustained by *S. v. Medlin,* 126 N. C., 1127, and cases there cited; *S. v. Garland (Hoke, J.),* 138 N. C., 678, cited and approved *S. v. Cox,* 153 N. C., 643; *S. v. Ray,* 166 N. C., 431; *S. v. Kennedy,* 169 N. C., 329; *S. v. Crisp,* 170 N. C., 793.

A careful review of the charge shows that the judge fully and carefully presented the case to the jury. His charge as to manslaughter on a sudden quarrel is sustained by the latest case, *S. v. Merrick,* 171 N. C., 788, and others there cited. His charge upon involuntary manslaughter through the negligent use of the gun is correctly stated. The evidence that the defendant cocked and presented the gun at Monroe when Amick, in attempting to prevent the killing of Monroe, rushed in and grasped the gun and in the struggle was himself shot, was evidence of a reckless disregard of Amick's life and of an unlawful act in pointing the gun. The charge as to the defendant's right to defend himself after provoking the difficulty by pointing the gun or otherwise is sustained by the cases above cited and by the latest case on the subject, *S. v. Wentz,* 176 N. C., 749.

The jury upon the evidence might have drawn the inference fairly that the discharge of the gun was a wilful act on the part of the defendant, though he testified to the contrary. The evidence was sufficient to be submitted to the jury and authorized them to draw the inference of which their verdict was the result, and in the law laid down by the court we find

No error.

STATE v. JOHN DITMORE.

(Filed 27 May, 1919.)

Arrest—Sheriffs and Constables—Officers—Summons to Assist—Disobedience—Criminal Law—Misdemeanor—Statutes.

One willfully disobeying an order to assist in making an arrest, given by one he knows to be an officer duly authorized to make it, is guilty of a misdemeanor within the intent and meaning of our statute (Revisal, sec. 3701), such officer not being required to give the one so summoned the name of the party to be arrested or any other information concerning the matter.

APPEAL by the State from *McElroy, J.,* at September Term, 1919, of GRAHAM, from a judgment upon this special verdict:

"On the first day of September, 1918, J. A. Ammons, sheriff of Graham, had in his possession a *capias* with him, which was issued from the Superior Court of Graham on a bill of indictment, commanding him to arrest one Mack Burchfield; that he took Sherman Crisp and

eight others with him and started to the home of said Burchfield to make the arrest, and on the way they passed the defendant in the road; that he told the defendant that he would have to summon him to go and help arrest some parties for whom he had a warrant, but did not tell who the parties were; that the defendant stated he did not want to go, whereupon the sheriff told him that if he did not go he would have to arrest him and take him; thereupon the defendant started with the sheriff and those who accompanied him and went for a short distance until he came near to his house, when he left the party and went in the direction of his house; that the sheriff, upon being told that he had gone, went to his house and made a search for him, but failed to find him."

The court, being of the opinion that in order to constitute a legal summons it was necessary that the sheriff should have told the defendant who it was that he was going to arrest, adjudged that the defendant was not guilty, and the verdict was so entered; to which the solicitor for the State excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. M. Jenkins for defendant.

CLARK, C. J. Rev., 3701, provides: "If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officers, he shall be guilty of a misdemeanor."

The essential elements of the offense defined in the above section are that the defendant, when commanded to aid an officer in arresting any person, or in retaking any person escaped from legal custody, or in executing any legal process, should wilfully neglect or refuse to aid such officer. These facts all appear in the above special verdict. As is said in Bishop New Cr. Proc. (2 Ed.), sec. 185: "An officer who is making an arrest, either with or without a warrant, or securing his prisoner afterward, may, if he deems it necessary, call upon a bystander for help, or even command the aid of all persons in his precinct. A refusal is indictable, provided he is proceeding by lawful authority; or if he is not, his command will be a justification to one who, knowing his official character, comes in good faith to his assistance."

The statute does not require that the person so summoned by the officer to aid in the arrest should be informed as to the court from which the process issued, or the nature of the offense, or the name of the party to be arrested. Whether or not he had knowledge of these

matters, it would in no wise affect his duty to obey the summons of the officer. It is sufficient if the officer is a lawful officer and has summoned the defendant to assist him in making the arrest.

"The duty of the citizen to aid the officer is absolute. His obligation to come to the aid of the sheriff (or other officer) is just as imperative as that imposed on the latter, to see that the community suffer no harm from licentiousness." 2 Wharton Cr. Law (11 Ed.), sec. 856.

"The protection afforded by a precept regularly issued to an officer for the arrest of a party charged with crime extends to all who aid in its execution." *S. v. James,* 80 N. C., 370; *S. v. McMahan,* 103 N. C., 382. In *Watson v. State,* 83 Alabama, 60, it is said: "A sheriff or other lawful officer may require any bystander to assist him in making arrest, and a refusal to assist him is a criminal offense. Though the officer may be a trespasser in making the arrest, as by arresting one person under a warrant of arrest for another, a bystander assisting him on demand, knowing his official character, is not criminally responsible."

On an occasion of this kind there is not usually time, and it is certainly not necessary for the officer to have a conference with the person summoned to aid in making an arrest and convince him that the process is lawful, and the nature of the offense, or whether the defendant therein is guilty, or the name of the party sought to be arrested. It is sufficient that the officer is a lawful officer and is proceeding by lawful authority, and even if he is not, as said by *Bishop, supra,* the command of the officer "will be justification to one who, knowing his official character, comes in good faith to his assistance."

As was said in *S. v. James, supra,* "The guilt or innocence of the party charged, or the false evidence on which the precept was based, does not impair this authority." *Meeds v. Carver,* 30 N. C., 298.

To the person summoned by a lawful officer to come to his aid in making an arrest it is absolutely immaterial and irrelevant what is the name of the party to be arrested or the nature of the offense.

"It is not for him to ask the reason why."

It is his duty as a good citizen, and in obedience to the authority of the State as represented by a lawful officer, to aid in the arrest.

Upon the special verdict the defendant should have been adjudged guilty.

The case will be remanded to the end that such judgment shall be rendered upon the facts found, and the court will impose the sentence of the law. *S. v. Ewing,* 108 N. C., 755; *S. v. Robinson,* 116 N. C., 1048.

Reversed.

STATE v. JAMES GASH.

(Filed 27 May, 1919.)

1. **Negligence — Criminal Law — Evidence — Homicide—Manslaughter—Instructions—Trials—Statutes.**

Upon an indictment for criminal negligence in running an auto truck in a city, there was evidence tending to show that the defendant was driving the truck along the street in a populous and principal residential portion of the city, at a rate of speed greatly in excess of the speed limit imposed by statute, that the view was unobstructed for some distance, and defendant having seen children upon the sidewalk or street in front of him, crossed an intersection of another street about 87 to 162 feet from where the children were playing, without giving the signal required by the statute or diminishing his speed, and while talking to another person on the sidewalk, with his head turned aside for the purpose, unexpectedly and without warning changed his course and ran upon the deceased child, inflicting the injury causing the death: *Held*, viewing the evidence in a light most favorable to the State, and disregarding the defendant's evidence to the contrary on his motion as of nonsuit, it was sufficient to be submitted to the jury and to sustain a verdict of involuntary manslaughter; and a charge that the defendant was guilty of involuntary manslaughter, if his excessive speed caused the truck to strike the child, or if the speed was not excessive, but the injury was caused by his carelessness and negligence in failing to keep a lookout ahead, is approved.

2. **Appeal and Error—Instructions.**

An instruction of the judge favorable to the appellant will not be considered on appeal.

3. **Appeal and Error—Instructions—Reinstructions.**

While a closing part of an instruction as to the credibility of a witness, a defendant in a criminal action, might be capable of misconstruction by the jury, it will not be held for reversible error when the judge has recalled the jury to correct it, and further instructed them to acquit him if the evidence in his favor raised a reasonable doubt, and that they should give his testimony the same weight as that of any other witness.

APPEAL by defendant from *Ray, J.*, at March Term, 1919, of BUNCOMBE.

The defendant, a colored chauffeur, was indicted and convicted on a charge of manslaughter and sentenced to four months in jail, with authority to commissioners to hire him out.

Attorney-General Manning, Assistant Attorney-General Nash and Mark W. Brown for the State.

Martin, Rollins & Wright for defendant.

CLARK, C. J. There is evidence that on 21 January, 1919, about 4 p. m., Porter Cordell, the deceased, a child of three years old, was

playing with one or more of his companions on the north sidewalk of College Street, in Asheville, near its intersection with Furman Avenue. Miss Clement and Mr. Lasater went by on the same sidewalk, going east. They walked slowly and were talking about some chickens in the yard they were passing, and when they had gotten a distance of from 75 to 150 feet from the point where the child was playing a truck driven by the defendant crossed the intersection of College Street and Furman Avenue (also called Pine Street) about 12 feet in front of them, without blowing the horn or giving any signal, and was going west on the south side of College Street, about 20 or 25 miles an hour. According to the evidence of these two witnesses their attention was attracted by the defendant, who was driving the truck, and his companion calling out to another colored boy just behind them on the sidewalk, and when they looked around they "saw these colored men looking back. . . . The boys on the front seat were looking around talking to this boy that was immediately behind the witnesses." "The driver was looking back, and when the conversation between the driver (the defendant) and the boy on the sidewalk started the car changed its course from the left (south) side of the street at an angle of thirty degrees towards the deceased and other children without warning to them." And after the child was struck the machine struck back "at about the same angle to the left." A spot of blood was made where the deceased was thrown into the street. The first sign of skid marks going west were in the center of the street, or a little to the left of the center, and then the marks went over to the right (north) side of the street to the spot of blood, between 4 and 6 feet of the curb. Miss Clement says that after she passed the baby the child went into the street, and when she looked back as the automobile was going by her she could not see the child in the street because "there was a telephone pole between her and where the baby was hit," and that she "hadn't turned around a minute when the car hit the baby, and it sounded like the noise of hitting a box or a bag of sand." It was during the interval that the baby went into the street.

There is evidence that the truck skidded 45 feet with both wheels locked and that if it had been running at eight miles an hour it could have been stopped in about one foot. The defendant testified that he saw the children on the sidewalk as he traversed the intersection of College Street and that he "never saw the baby leave the sidewalk and never saw it until it hit the car"; that "the first time he saw the baby was when he hit the car; . . . that if he had seen the baby he would have stopped the car; that he could not tell how the baby got out in the street; that the baby ran in front of the car and he tried to dodge it and changed the course of the truck but the right front fender struck the child."

The baby was knocked down and the truck ran over his feet "crumpling" his shoe, and he was rushed to the hospital where he suffered for 47 hours; his eyes becoming "swollen shut"; and he vomited blood and gradually got worse until he died 23 January, 1919.

College Street at the place where the baby was killed runs east and west and is practically straight for four blocks, and the children could be seen by persons east of Furman Avenue for a distance of "two and a half blocks," with no obstruction but telephone posts, which are 120 feet apart. The grade at that point was about 3 per cent. It is a residence street and where the child was killed "It was as thickly settled as any part of Asheville."

The above summary is taken almost verbatim from the brief of the State, for the chief, if not the only, exception that requires consideration is the motion for nonsuit, which must be taken in the aspect most favorable to the State upon such motion, and upon examination of the record the facts are summed up correctly, omitting as we must, on such motion, the evidence in favor of the defendant. There was evidence for defendant from which the jury might have found for the defendant, if believed, but that was for the jury and cannot be considered on an appeal from a refusal to nonsuit.

Taking the evidence in this aspect, there was sufficient to submit to the jury tending to show that the death of the child was caused by the criminal negligence of the defendant in that: (*a*) He was operating a motor truck at a speed in excess of 18 miles an hour in violation of Laws 1917, ch. 140, sec. 17; *S. v. McIver,* 175 N. C., 761.

(*b*) He recklessly approached and traversed the intersection of College Street and Furman Avenue, a distance of from 87 to 162 feet from the deceased and other children, whom he says he saw, at a rate of speed much in excess of 10 miles an hour, in violation of the statute. Laws 1917, ch. 140, secs. 15, 17; *S. v. McIver, supra.*

(*c*) He recklessly approached and traversed an intersection of highways and ran over the deceased, who was upon the traveled part of the highway, without slowing down and giving a timely signal, as required by the provision of law just quoted; and without warning to them and while looking in the opposite direction.

(*d*) He recklessly caused the motor truck to change its course from the south side of College Street, without notice or warning to the deceased, and permitted the truck to skid a long distance and collide with the deceased and run over the deceased when he might have avoided injuring him after seeing him on the sidewalk and in the street.

Exceptions 1 and 2 were for refusal of a motion to nonsuit, and Exception 3 was for refusing to give the following instruction: "In no view of the evidence is the defendant guilty of the offense charged, and therefore the jury is directed to return a verdict of not guilty."

Upon the evidence favorable to the State, as above summed up, there was no error in these respects. Exceptions 4 and 5 to the charge are because the court charged the jury that if the defendant was operating the motor in violation of the ordinance or the statute regulating the speed and manner of operation of motor vehicles in any city or town in the State, and if by reason thereof and while exceeding the speed limit he struck the child, this would make him guilty of involuntary manslaughter. In this there was no error. *S. v. McIver,* 175 N. C., 761, which is a full exposition of the law applicable to this case.

Exception 6 is because the court charged the jury that if the defendant was operating the car lawfully and at the rate of speed permitted by law, yet if by reason of a failure to keep a proper lookout he failed to see the deceased in time to avoid injuring him, and "by reason of his carelessness and negligence in failing to keep this lookout" he caused the death of the child, he was guilty. Upon the evidence for the State this failure to keep a lookout was due to the defendant turning his head and looking back to talk to a colored boy on the sidewalk. In this charge there was no error. It was the duty of the defendant, after seeing the children on the sidewalk and knowing that they were likely to run out on the street, unless warned of his approach, to give such warning, which he did not do, but turned his head to look back, and if while so doing he caused the truck to change its course and to strike the deceased, he is guilty of criminal negligence.

Exceptions 7, 8, and 9 need not be considered for that part of the charge was favorable to the defendant.

Exceptions 10 and 11. The language used by the judge in closing his charge might possibly have been misconstrued, and at the instance of the counsel for the defendant he recalled the jury and charged them that if the evidence for the defendant raised a reasonable doubt it was their duty to acquit him, and that the jury had a right to believe him the same as any other witness and to give to his testimony the same weight.

Upon careful consideration of the whole case we find

No error.

STATE v. LATTA FINCH.

(Filed 27 May, 1919.)

1. **Homicide—Self-Defense—Instructions—Evidence.**

An instruction on a trial for a homicide that should the jury find the facts to be as testified they should find the defendant guilty of manslaughter, constitutes reversible error where there is evidence in the prisoner's behalf of a perfect self-defense, for such evidence will be taken as true on appeal and interpreted in the light most favorable to the prisoner.

2. **Homicide—Self-Defense—Escaped Convict—Rearrest—Resisting Arrest.**

While ordinarily one on trial for a homicide may not establish his plea of a perfect self-defense when he has wrongfully provoked a difficulty, involving a breach of the peace, and kills his adversary in the progress of the fight, unless at a time prior to the killing he had quitted the contest and in some way signified his purpose to do so, this doctrine does not apply when the deceased knowingly resisted rearrest by an officer from whose lawful custody he had escaped, who shot and killed the deceased under a reasonable apprehension of death or great bodily harm, and without excessive force, as it appeared to him under the circumstances, the reasonableness of this apprehension and of the force he used being ordinarily questions for the determination of the jury.

3. **Homicide—Convicts—Escape—Rearrest—Counties.**

A township superintendent of convicts and one of his guards, when summoned by him for the purpose, may lawfully rearrest in any county of the State without a new warrant one of the convicts who had escaped from his custody while serving a sentence of court, and hold him until his time had fully expired, not counting the time he was wrongfully out of prison by reason of the escape. Revisal, sec. 5407.

4. **Same—Common Law—Statutes—Constitutional Law.**

The common-law doctrine that an escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court, is not changed either by our Constitution or statutes (Revisal, secs. 2817 and 937) relating to the confines of the particular county, having reference to process and writs directed to them; and Revisal, secs. 3176-3182, not specifying or inhibiting the application of the common-law doctrine.

5. **Convicts—Escape Officers—Rearrest—Public Duty—Right Barred.**

It is the duty of the lawful officer to rearrest an escaped prisoner as a requirement for the public interest, whether the escape was through negligence on his own part or voluntary, which right and duty cannot be barred or impaired by reason of the wrongful absence of the prisoner at the time, by his connivance or with his permission.

6. **Homicide — Convicts — Escape — Self-Defense—Evidence—Questions for Jury—Trials.**

Upon the trial of an officer for the killing of an escaped prisoner whom he may have lawfully arrested, there was conflicting evidence as to whether the officer called the convict to the door of the house, and in-

stantly shot him and killed him, upon calling him to put up his hands just after the convict had opened it, or whether, at the time of the killing the convict motioned to draw a pistol under circumstances threatening death or great bodily harm, and whether the convict knew he was being arrested by the proper officer of the law to compel him to fill his unexpired sentence imposed by the court and from which he had escaped: *Held*, it was for the jury to find the facts on the plea of a perfect self-defense and to acquit the prisoner should they find that the deceased knew that the prisoner was making the arrest as a lawful officer, and that the latter, upon being wrongfully threatened with the former's pistol, and knowing his reputation as a dangerous character, and from the other facts and circumstances as they reasonably appeared to him, in the judgment of the jury, acted upon the apprehension that it was necessary for him to kill the deceased to save himself from death or great bodily harm.

INDICTMENT for murder, tried before *Calvert, J.*, and a jury at December Term, 1918, of WAKE.

At the call of the cause for trial, the solicitor for the State announced in open court that he would not insist on a verdict of murder in the first degree but would ask for a verdict of murder in the second degree or manslaughter, as the evidence might disclose.

The testimony having been offered for the State and for the defendant, the court was of opinion that, in any aspect of the evidence, the defendant was guilty of the crime of manslaughter, and accordingly instructed the jury, in part, "That if they should find the facts to be as testified to by the defendant and his witness, W. J. Barbour, they must return a verdict at least of 'Guilty of manslaughter.'"

Defendant was convicted of the crime of manslaughter, and, sentence having been pronounced, appealed, assigning for error, among others, the ruling of the court on the question of manslaughter.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Armistead Jones & Son and Wm. B. Snow for defendants.

HOKE, J. There was evidence on the part of the State to justify a conviction of the offenses as prosecuted by the solicitor, but on a charge of this character, which in terms withdraws from the defendant any and all right to a perfect self-defense, it is the necessary and accepted rule with us that the facts which make for such a position on behalf of the defendant shall be taken as true and interpreted in the light most favorable to him, and considering the record in view of these principles, it was proved on the trial that on 5 September, 1918, at the home of Andrew Turner, in Wake County, said Turner being the father-in-law of deceased, and a tenant on the plantation of J. A. Stephenson, in said county, the defendant shot Walter Penny, inflicting

a mortal wound from which he later died. There were also facts in evidence tending to show that this Walter Penny, convicted for carrying concealed weapons, had been sentenced and committed under the provision of the statute applicable, to work the roads of Clayton Township, Johnston County, apparently in the latter part of 1917, and that his term of imprisonment had not expired; that soon after his commitment under the sentence he escaped from the road force, and having been located by W. J. Barbour, superintendent of the road force of said township, having full charge and control of the convicts working thereon, he returned to the convict camp, after an absence of about ten days, and took his position as prisoner under his said sentence; that having remained with the force about ten or twelve days he overpowered the guard left to watch him and again escaped, and had not since been a prisoner; that on his second escape he at first lived with one Tink Hobby, on the latter's place in Wake County, and later he quit Hobby and went to Andrew Turner's, a tenant on the farm of J. A. Stephenson, also in Wake; that the deceased married the daughter of this Andrew Turner and the two were living with Andrew Turner, in Wake, at the time of the homicide.

It appeared, also, that while the deceased was working with Hobby, W. J. Barbour, said superintendent, was informed of the whereabouts of deceased, and being approached by Hobby with a request to allow the deceased to work on a while longer before his rearrest, had replied he had better do it as his houses for keeping his prisoners had recently burned and he had then no proper place to restrain or keep them; that later, to wit, in September, 1918, having learned that the deceased was at Andrew Turner's, on the J. A. Stephenson place, he summoned the defendant, one of his guards, to go with him for the purpose and arrest the deceased; that about 8:30 or 9 p. m., of 5 September, they went to the house of Andrew Turner, and on inquiry were told that the deceased had not yet come in; that the two then drew off some little distance and concealed themselves in a cotton patch near the house. Later, Walter came in and Barbour and the defendant heard his people tell him that two men had been there to inquire for him, and on description given deceased said, "That's Captain Barbour. I am not going with him any damn where." He then said, "I wouldn't be surprised if the sons of bitches weren't hid out here in the cotton patch right now," whereupon he threw several rocks over into the cotton patch, some of them striking near the defendant and Barbour, his companion; that deceased having gone back into the house, defendant and Barbour went for Stephenson and induced him to go with them to the Turner house, thinking that deceased would more likely respond to his call and come out. Returning with Stephenson, Barbour went around to

the back door of the house and defendant and Stephenson were at the front door when the latter called to Andrew Turner and asked if Walter Penny was there. Andrew replied that he was and called him; that Walter came to the door, and as he opened the door Finch, the defendant, called to him to "throw up his hands." At this point the evidence on the part of the State is to the effect that when defendant called to Walter, "throw up your hands," he immediately fired, inflicting the fatal wound. On the part of the defendant, however, testifying in his own behalf, the witness said "That he had been notified that the deceased was a violent, dangerous man and that he would have to be very careful; that while he was lying in the cotton patch he had heard Walter say with an oath that he would go nowhere with Barbour, that he would die first. He also knew of his two escapes which occurred before defendant was employed as guard; that when Walter came to the door witness had not drawn his pistol but called to him to hold up his hands so the witness would be protected from a dangerous assault; that instead of obeying this order deceased immediately made a motion to his hip pocket as if to draw a weapon, when witness drew and fired towards his hand to disable him and protect himself; that he shot in the present belief that Walter was about to shoot him and for no other reason. There was other testimony corroborating defendant's evidence in part and also as to the bad reputation of the deceased for violence and that he would shoot, etc. It was further shown and urged in corroboration of defendant's position that the wound inflicted was three inches down and to the right of the middle towards the hip, but the shot had penetrated the larger intestine, lacerating the liver, and was a mortal wound, producing death as stated. It further appeared that Finch himself did not know Penny personally, the escape having taken place before defendant was employed as guard, and there was no testimony that the deceased had personal acquaintance with Finch.

On this, a sufficient statement of the occurrence to give a correct apprehension of the grounds of defendant's appeal, it is the accepted law in this jurisdiction that when one has wrongfully provoked a difficulty, involving a breach of the peace, and in the progress of the fight kills his adversary, he cannot maintain the position of perfect self-defense unless, at some time prior to the killing, he has quitted the contest and in some way signified his purpose to do so. *S. v. Crisp,* 170 N. C., 785-790; *S. v. Kennedy,* 169 N. C., 327. On the record, if defendant, without lawful excuse, went to the place where deceased made his home, called him to the door and ordered him to throw up his hands, such conduct, in its most favorable aspect, would come well within the principle stated, and as his Honor held, would preclude defendant from

maintaining the position of perfect self-defense, and the question of his right to go to the jury on such an issue would largely depend on whether he acted as of right when, as assistant to Barbour, the superintendent of convicts in Johnston County, he engaged in the effort to arrest the deceased in Wake County, having no warrant for the purpose; and second, whether, if he had the power, he was proceeding to exercise it in a lawful and proper manner. Recurring to the facts in evidence, it appears that W. J. Barbour was the superintendent, having the lawful custody and control of the convicts working the roads in Clayton Township, Johnston County; that the deceased was under a lawful sentence and commitment to work the roads in said township, said county, for a stated period; that he had escaped by overpowering his guard, and the time of his imprisonment had not then expired, and on such facts we are of opinion that the superintendent, having lawful charge of said convicts, as stated, was empowered, without warrant, to recapture the escaped prisoner anywhere within the borders of this State, assuredly, and hold him till his sentence had fully expired, and that, both on precedent and, with us, by express provision of our statute, the time when he was wrongfully out of prison by reason of his escape is not to be counted. *Clark v. Commonwealth,* 62 Va., 777; Rev., sec. 5407. This we think was undoubtedly the approved position at common law, and we find nothing in our Constitution or statutes that in any way destroys or impairs its effect and operation at the present time. The principle and the reason upon which it rests is very well stated in *Pearl v. Rawdin,* V Day's Reports, pp. 244-249, as follows: "When an officer holds any person a prisoner in legal custody, on arrest, and the prisoner escapes by force or otherwise, against his will, the officer has a right to his body and power to retake him at any place to which he may abscond. It is a matter of no consideration whether his original writ could have been legally served within the jurisdiction in which he retakes him, for he retakes him not by that writ, but by virtue of the hold he had on him by the arrest.

"By the common law, if a prisoner escapes into another county in which the sheriff has no jurisdiction, and is there retaken, the retaking is legal, and the prisoner shall have no remedy by *audita querela,* for he shall not take advantage of his own wrong. *Boynton's case,* 3 Co., 43; *Ridgeway's case, ibid.,* 52." The same position is fully recognized in a case in our own Court of *S. v. Stancil,* 128 N. C., 606. In that case a prisoner, sentenced to the roads in Mecklenburg County, had escaped ten years before and was, at the time of the homicide, in the adjoining county of Gaston. Meantime there had been a change of superintendents and the superintendent who then filled the office, having

ascertained where the deceased was, went to Gaston County, and without warrant and without announcing his authority, engaged in the endeavor to arrest the deceased, who fled and was shot and killed as he ran. On these facts a conviction for manslaughter was upheld by a divided Court, but a perusal of the case will show that the ruling was made to rest on the wrongful manner in which the defendant had proceeded, and there was no difference of opinion among the judges as to the power of the superintendent of the road force of Mecklenburg County to arrest an escaped prisoner, without warrant, in the county of Gaston. Thus, *Chief Justice Furches,* who wrote the prevailing opinion, after sustaining the conviction on the ground that "The superintendent of a convict gang, *not known* to *be* an *officer,* has no right to shoot or kill one who, having committed a petit larceny and having escaped from prison, is *running away to avoid arrest,*" on the question of the power to make such an arrest, said: "Nor do we think the fact that the prisoner was the superintendent of the convict camp in Mecklenburg County gave him any authority to make the arrest under the facts in this case. And in saying this, we will not be understood to say that we do not think the superintendent of a convict camp would not, ordinarily, have the right to arrest an escaped convict. This we think he would have, where the convict knew that he was such superintendent. And he would have this right in such case without making known the fact that he was such superintendent, as this would be useless if the escaped prisoner knew the fact. Nor do we think that in such a case it would be necessary for such superintendent to procure any other authority to do so. In fact, we know of no one who would be authorized to give him any other authority.

"But in this case it had been ten years since Rossell escaped, and when he did so one Sossaman was superintendent. The prisoner (defendant) did not know Rossell, and had him pointed out; and there is not the slightest evidence that Rossell knew him or knew that he was superintendent of convicts in Mecklenburg County. This being so, we are of the opinion that the prisoner had no more right to make the arrest than any private citizen would have had." And in the dissenting opinion by his Honor, *Cook, Judge,* concurred in by the present Chief Justice, the doctrine as it prevailed at common law and which is said to be still controlling is stated as follows: "Why should the escaped convict be entitled to more protection than while escaping. He cannot fall within the protection of those sections of The Code which are made for the benefit of those having a legal right to control their time and conduct before a conviction. No machinery of the law is provided for the capture of an escaped felon under sentence. Warrants are provided for the arrest of the accused, to the end that the truth may be inquired into—

not for the convicted. After the conviction and sentence the felon has no liberty. By his own wilful conduct he has forfeited it, and it has been so adjudged." This position has the support of well-considered cases in other jurisdictions and the authoritative text-books on the subject are to like effect. *Pickelsimer v. Glazener,* 173 N. C., 630-635; *S. v. Lingerfelt,* 109 N. C., 775; *Parker v. Bidwell,* 3 Conn., 84; *S. v. Holmes,* 48 N. H., 377; *Commonwealth v. McGahey,* 77 Mass., 194; *Taylor v. Tainter,* 83 U. S., 366-371; *Schwamble v. The Sheriff,* 22 Pa. St., 18; *Leonard v. Rodda,* App. Ca. Dis. Co., 256; *Gano v. Hall,* 42 N. Y., 67; approving decision of *Clark v. Cleveland,* 6 Hill, 344; Russel on Crimes (9 Ed.), 586; Bishop's New Crim. Procedure (2d Ed.), 1189; 1 Chitty's Crim. Law, 61; 2 Hawkins P. C., 193; Clark's Crim. Procedure, 38; 5 Cor. Juris, 436-437.

In several of the cases cited the court was dealing more directly with the right of bail to assert these principles in civil suits and in which the judges, upholding such right without warrant and wherever found, likened it to the recognized power of an officer to rearrest an escaped prisoner who had been lawfully committed to his keeping and control. Thus, in *Taylor v. Tainter, supra, Associate Justice Swayne,* speaking of this right of bail in such case, said: "Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize and deliver him up in their own discharge, and if that cannot be done at once, they may imprison him till it can. They may exercise their rights in person or by agent. They may pursue him into another State, arrest him on the Sabbath, and may break and enter his house for the purpose. The seizure is not made by virtue of a new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner." And *Walker, J.,* in *Pickelsimer's case,* and *Shepherd, J.,* in *S. v. Lingerfelt,* are to like effect. And a perusal of these other authorities will disclose, as stated, that the right of a sheriff or other officer to rearrest a prisoner who has been lawfully committed to his keeping is not restricted to his own county, and while a distinction is noted in some of the cases as to the rights of the officer in case of *mesne* and final process in civil cases, there is none recognized in criminal causes nor does it make any difference in these causes whether the escape has been voluntary or negligent. We were referred by counsel to some decisions to the contrary, notably *S. v. Endsley,* 122 Tenn., 647, and *McCaslin v. McCord,* 116 Tenn., 693, which apparently proceed upon the principle that an officer must have a warrant for the arrest of an escaped prisoner except upon fresh pursuit. But, in our opinion, the right was not so restricted at common law and, as heretofore stated, we find nothing in our statutes which impairs or tends to impair the

common-law principle. Thus, in Bishop's New Criminal Procedure it is said: "We have seen that an arresting officer may without fresh warrant recapture a prisoner who has broken away from him and so may the keeper of one imprisoned on sentence who escapes 'even,' says *Hale,* speaking of a felony, 'seven years after, though he was out of his view,' a doctrine which plainly is not different in a misdemeanor." In Russel on Crimes, 586, the principle is given as follows: "It seems to be clearly agreed by all of the books that an officer, making fresh pursuit after a prisoner who has escaped through his negligence, may retake him at any time afterwards whether he find him in the same or a different county, and it is said generally in some books that an officer who has negligently suffered a prisoner to escape may retake him whenever he finds him without mentioning any fresh pursuit, and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it." A statement that is in exact accord with Chitty and Hawkins, and showing that these accurate authors give preference to the position that the right to rearrest of an escaped prisoner by an officer holding him under a lawful sentence is not dependent on instant pursuit but may be exercised at any time and at any place, at least where the sentence of the court has the effect of determining the status of the convict.

In support of his Honor's ruling, it is insisted for the State that, under sec. 2817 of the Revisal, the power of a sheriff and his lawful deputies is confined to the territory of their respective counties, and under the terms and general policy of this section the same limitation should be extended to general superintendent of convicts and all other county or local officials, a similar position as to constables appearing in Rev., sec. 937.

An examination of the statute, however, will show that the section in question simply enjoins upon the sheriff and his deputies the duty of serving all process or other writs which are especially addressed to them within the border of their counties; that there is nothing inhibitive in the law as to the power of the sheriffs, and neither in its terms or purpose does it apply nor is it intended to apply to a case like the present, where no additional process is required and where the sheriff or superintendent of a convict camp or other officer has the custody and control of a convicted criminal under a sentence and commitment of a competent court having full jurisdiction of the question. Again, it is contended that the sections of the Revisal appertaining to arrests without warrant, secs. 3176-3182, do not directly specify nor include a case like the present where the convict in question was under sentence only for a

misdemeanor and the officers of Johnston County were endeavoring to exercise the right of arrest in the county of Wake, but as pointed out by *Cooke, J.*, in case of *State v. Stancil,* these provisions contemplate and refer throughout to the arrest of persons accused of crime and before any hearing was had, and is in no way designed to regulate or restrict the power of an officer to pursue and recapture an escaped prisoner who has been especially committed to his keeping under judicial sentence and whom he is required to hold, in the proper performance of his official duty. In such case, not only is this right of arrest without warrant, in the same or a different county, in accord with the recognized principles of the common law, but, on reflection, it will appear that this right is necessary to a proper and adequate protection of the State's peace. These convict camps, having prisoners of different grades, whose sentence may be as high as ten years, in the course of their work are not infrequently on the borders of adjacent counties, and in case of a "general get-away," a case not at all unsupposable, it would present a deplorable condition if an officer was required to have a warrant to pursue and rearrest the escaped prisoners. Throughout the sections referred to a hearing is clearly contemplated and provided for, involving also the right of appeal, and so it might come about that a camp, composed of outlaws and convicted felons, could roam at will, to the constant and very real menace of law-abiding people while their cases were following the constitutional and statutory methods of criminal procedure. Nor can it be maintained that the right of arrest is barred or impaired in this case by reason of the evidence, which tends to show that the convict may have been absent at the time by the connivance or permission of the superintendent. Given his authority for the benefit of the public, a public officer having custody of a convicted criminal cannot estop or disqualify himself from acting at all times as the public interest may require in the performance of his official duties, and both reason and approved precedent are to the effect that it is his right and his duty to rearrest an escaped prisoner when and wherever he may be found, and whether the escape has been negligent or voluntary. This position is very satisfactorily discussed by *Justice Morris* in case of *Leonard v. Rodda,* 5th Appeal Cases, District of Columbia, *supra,* and in the opinion he refers with approval to a Pennsylvania decision on the subject as follows:

"In the case of *Schwamble v. Sheriff,* 22 Pa. St., 18, the Supreme Court of Pennsylvania said: 'In civil cases, if a party escapes who is in custody on *mesne* process, he may be retaken at any time before return day. If he is held on final process, the sheriff becomes absolutely liable for the debt and costs by suffering the prisoner to go at large,

and he cannot imprison him again. But a party who is in custody, accused or convicted of a criminal offense, whether he be in jail awaiting his trial or in execution of a sentence after trial, if he escapes he may be recaptured at any time afterwards, and this whether the escape was voluntary or involuntary on the part of the sheriff. It is well settled that one who has been detained for the nonpayment of a fine may be retaken by the very officer who consented to his escape. 6 Hill, 349; 1 Neil Gow's N. P. Cases, 99. It is no argument against this rule that an officer who permits the escape of a convicted criminal may be indicted as the criminal himself would be. The officer does not suffer instead of the criminal, but he is punished with him; and though it be according to the same measure, it is for a distinct offense.'" And *Ex parte Sherwood,* Tex. Civ. App., 15 S. W., 812, and *Simpson v. State* (Ark.), 19 S. W., 99, are to the same effect. On a proper consideration of these principles the defendant, summoned by the superintendent of convicts for the purpose, who was himself present, had a right to take part in this arrest, and this being true and in that aspect of the matter, we are of opinion that the evidence requires that the right of the defendant to maintain the position of a perfect self-defense should be submitted to the jury, and on the facts as they now appear and a correct application of the authorities cited, if the defendant, having called to the deceased to throw up his hands, shot and killed the deceased, shot wantonly and without giving him opportunity to obey his order, there would be nothing to rebut the presumption of malice which arises from the unlawful killing with a deadly weapon, and the defendant would be at least guilty of murder in the second degree; or second, if he shot and killed the deceased without malice but in the exercise of unnecessary force, he is guilty of the crime of manslaughter. Third. If he appeared at the door of the deceased's home at night and without announcing his authority or purpose and the deceased being ignorant of the same, he called to the deceased to throw up his hands and shot and killed him in the course of the difficulty so provoked, under the cases referred to he would be guilty of manslaughter, though at the precise time of the homicide the deceased may have made a demonstration as if to draw a deadly weapon. If, however, the defendant, acting on the summons of the superintendent, while engaged in the effort to arrest the deceased, an escaped convict, appeared at the door of the deceased, called to him to throw up his hands, and the latter, being aware of his purpose and authority, made a demonstration as if to draw a deadly weapon, and from all the facts and circumstances as they reasonably appeared to the defendant, in the judgment of the jury, it became necessary to kill the deceased to save himself from death or great bodily harm, in such case the defendant would be entitled to an acquittal.

For the error indicated there must be a new trial of the cause, and it is so ordered.

New trial.

STATE EX REL. THE BRYANT MANUFACTURING COMPANY v. R. J. HESTER ET AL.

(Filed 2 April, 1919.)

1. Deeds and Conveyances — Registration—Indexing—Decisions—Prospective Effect—Title.

The decisions of *Ely v. Norman*, 175 N. C., 298; *Fowle & Son v. Ham*, 176 N. C., 12, holding in effect that indexing and cross-indexing conveyances of land by the register of deeds of a county were essential to a valid registration, are prospective in effect, and not applicable to titles to lands acquired under the construction to the contrary in *Davis v. Whitaker*, 114 N. C., 279.

2. Deeds and Conveyances—Registration—Notice.

The principle as to notice by a valid registration of a prior executed conveyance of land not being supplied by notice of another character however full and formal, does not apply when the title is not directly involved, but damages of a pecuniary nature are sought against the register of deeds alleged to have been indirectly caused by his failure to fully index and cross-index a prior registered conveyance affecting a contract to manufacture timber growing upon the lands therein conveyed.

3. Register of Deeds—Deeds and Conveyances—Indexing—Default—Damages—Proximate Cause—Statutes.

While the register of deeds and the surety on his official bond are liable under our statutes, Revisal, secs. 2658, 2665, 301, 3600, for his failure to index and cross-index instruments as required by law, such liability does not arise to the individuals claiming damages therefor unless the default of the register in these particulars has been the proximate cause of pecuniary injury to the claimant, and liability will not be imputed to the register of deeds when the negligence of the claimant or his agent, charged with the duty of looking after the matter, has caused or concurred in causing the injury.

4. Same — Pleadings — Admissions — Instructions — Notice—Attorney and Client.

In an action against the register of deeds and his bondsmen for his failure to fully index and cross-index a prior registered mortgage of the timber on lands afterwards conveyed to the plaintiff, the failure of the plaintiff's title causing the damages alleged in his action to have arisen on account of moneys advanced under a contract to manufacture it, there was an admission in the answer that the indexing and cross-indexing had not been fully done, but with allegation that the attorney of the plaintiff in investigating the title had been put upon notice of the prior registered deed by a written instrument of bargain and sale in the chain

of title from plaintiff's immediate grantor, distinctly referring to the prior conveyance, and that this fact was reported to the plaintiff: *Held*, it was reversible error for the trial judge to instruct the jury that the defendant's admission of his default in fully indexing or cross-indexing the prior registered mortgage was an admission of defendant's liability, this question depending upon whether the default charged and admitted by the register of not fully indexing and cross-indexing the prior encumbrance was the proximate cause of pecuniary loss to plaintiff or whether it was due to the plaintiff's own negligent default on the facts known to him or his attorney he employed to investigate the title, or which he or his attorney should have known if reasonably attentive to his interest.

5. Register of Deeds—Deeds and Conveyances—Indexing—Default—Measure of Damages.

The measure of damages, when recoverable, in an action against the register of deeds, for the pecuniary loss suffered by one taking a mortgage on timber standing upon lands subsequent to a mortgage on the lands, not fully indexed, and arising upon a contract to cut the timber dependent upon the title, are such damages as were probable under the facts as they existed and which can be ascertained with a reasonable degree of certainty; and it is reversible error for the trial judge to instruct the jury that they may award the difference between the sum advanced and that repaid by the other party to a contract, it not being established that such other party was insolvent or that the plaintiff could not have protected himself, at least to some extent, under the second mortgage on the timber he had taken as security, notwithstanding the prior lien of the first one.

ACTION tried before *Calvert, J.*, and a jury, at January Term, 1919, of BLADEN.

The action is against the register of deeds of Bladen County and the surety on his official bond to recover damages alleged to have been caused by the register's negligence in failing to properly index and cross-index a prior mortgage whereby the relator of plaintiff, holding a record mortgage and contract, suffered substantial damage.

The court ruled that liability on the part of defendant was admitted in the pleadings and the issue was only on the question of damages. The cause was then submitted to the jury on the following issues, defendant excepting:

1. Did the plaintiff advance money to Moore & Moore upon the execution of the mortgage by Moore & Moore to the plaintiff to secure the same, and if so, what amount?

2. Were Moore & Moore entitled to any credits on the amount so advanced by the plaintiff, and if so, what was the amount of such credit?

3. What amount is the plaintiff entitled to recover?

The court then charged the jury if they found the facts to be as testified to by the witnesses they would answer the first issue, "Yes, $2,000"; second issue, "Yes, $758.85"; third issue, $1,241.15, with $15 accrued interest."

Judgment for plaintiff, and defendant excepted and appealed.

McClammy & Burgwin for plaintiff.
Bayard Clark, E. F. McCulloch, Jr., and R. S. White for defendant.

HOKE, J. It may be well to note that the recent decisions to the contrary, *Ely v. Norman,* 175 N. C., 298, and *Fowle & Son v. Ham,* 176 N. C., 12, being prospective in operation, and the rights of these parties having been acquired and held under our registry laws as they were construed and applied in *Davis v. Whitaker,* 114 N. C., 279, to the effect that indexing and cross-indexing were not essential to a valid registration, notwithstanding the defects alleged in this instance, the prior encumbrance was properly registered and constituted a valid lien on the property. And again, that this is not a case where the title to the timber is directly involved and in which case no notice, however full and formal, will supply the place of a valid registration, *Robertson v. Willoughby,* 70 N. C., 358; *Todd v. Outlaw,* 79 N. C., 235, but the suit is an action to recover damages for the negligent breach of duty on the part of the register of deeds in failing to index and cross-index an instrument by means of which plaintiff suffered pecuniary loss. Considering the record in view of these positions and on the question whether liability was admitted in the pleadings, it is alleged in the complaint, in effect, that in 1914 Moore & Moore, as owners of certain timber on a designated tract of land in Bladen County, contracted with relator of plaintiff to cut the timber on said land and deliver same to relator in rafts at their landing within bounds of the property at the rate of seven dollars per thousand feet and at the rate of not less than 60,000 feet per week till same was all cut and delivered, and relator, the Bryant Manufacturing Company, hereafter spoken of as plaintiff, was to retain as much as $2 per thousand feet to reimburse plaintiff on advancements to be made under the contract, to the amount of $2,000, to enable Moore & Moore to begin operations; that these advancements were to be made in case title was ascertained to be good by plaintiff's attorney, and before same was made Moore & Moore were to give a mortgage on the timber to secure repayment to plaintiff of sums advanced; that plaintiff's attorney having informed plaintiff that there were no encumbrances on the property, the mortgage was given, recorded, and plaintiff advanced the $2,000 to Moore & Moore as agreed upon; that Moore & Moore entered on the work of cutting and rafting the timber, and having delivered sufficient timber to make a repayment thereof of $758.85, this from the $2 per thousand authorized to be retained, and having failed to deliver further, on inquiry, told plaintiff they could not go on without more pecuniary help; that plaintiff declined to advance more except under its own super-

vision, and himself entered on the work, when he was stopped by court injunction, in a suit by N. H. Carter and B. F. Keith, who held a prior mortgage on the timber, duly registered and executed to them by Blackburn and Jackson, from whom Moore & Moore had bought the same, said mortgage purporting to secure Carter & Keith, the original owners of the timber, in the sum of $6,000, the original purchase price; that plaintiff had frequently endeavored to obtain repayment of the balance due on the advancements from Moore & Moore, to wit, the $1,241.15, with said accrued interest, and had failed to do so. The defendants, alleging that the register had duly recorded the prior mortgage and indexed the same, showing the names of the grantees, admitted that the same had not been fully indexed and cross-indexed as the statute required. The answer, then, having put in issue the other allegations of the complaint tending to fix liability, made further averments to the effect that the condition and records appearing in the register's office were such as to put the plaintiff on full notice of the existence of the prior mortgage; that it was referred to and fully described in the bill of sale by which Blackburn and Jackson conveyed the timber to Moore & Moore; that the paper containing such recital was on record and was read by counsel for plaintiff when making an examination of the title and a copy thereof taken, and for this the index and cross-index would have fully disclosed the page and book, etc., showing the existence and proper registry of the prior mortgage complained of; and the answer denies, further, that the plaintiff's attorneys ever reported to him that the title to the timber was unencumbered but that plaintiff knew or had every reason and opportunity to know of the existence of this prior mortgage, and that his loss, if any was suffered by him, should be properly attributed to his own negligence and not otherwise. On these, the averments chiefly relevant, we are of opinion that there was error in the ruling that liability for this alleged default was admitted in the pleadings. Our statutes on this subject, Rev., secs. 2658, 2665, impose on the register of deeds the duty of diligently and promptly registering instruments filed with him for the purpose and of indexing and cross-indexing the same within twenty-four hours after registry, and action lies by the person injured for default in this respect. *State ex rel. Daniel v. Grizzard,* 117 N. C., 105. In section 301 he is required to give a bond not to exceed $10,000 for the safe-keeping of the books of his office and otherwise for the faithful performance of his duties. By section 3600 he is made indictable for a misdemeanor for failure to index and cross-index instruments as required by the law and within twenty-four hours after registry. While the proper performance of the official duties of this officer are thus rigidly insisted upon and have taken on even greater significance since our Court has held that the indexing

and cross-indexing are essentials of a valid registration, a liability does not arise to individuals unless the default of the register in these particulars has been the cause and the proximate cause of pecuniary injury to the claimant. Unless otherwise provided by the statute itself or arising as it may do in certain instances from its very nature and characteristics, this prerequisite to the maintenance of an action for breach of a statutory duty, that it should be the proximate cause of the injury complained of, is very well illustrated in several of our more recent decisions, as in *Paul v. R. R.*, 170 N. C., 230; *McNeil v. R. R.*, 167 N. C., 390, and *Ledbetter v. English*, 166 N. C., 125. And in this connection it is held, in well-considered cases, that liability will not be imputed to the officer when a given duty has been imposed with more especial reference to the protection of individuals, and the negligence of the individual claimant or his employee or agent, charged with the duty of looking after the matter, has caused or concurred in causing the injury. *Burris v. Austin*, 85 S. C., 60, and authorities cited; *Leck v. Madden*, 36 Cal., 208 (5 Amer. Dec., 175); 23 Amer. and Eng. (2d Ed.), 379; see, also, 34 Cyc., p. 1021. And the general principle has been recognized in a case at the present term, in *Rice v. Ins. Co.*, 98 S. E., 283, citing for the position, among other cases, *Dare v. Constr. Co.*, 152 N. C., 23. In this last case it was held: "While a person cannot take advantage of his own wrong, the court will not furnish a person a remedy for a wrong when he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrong-doer and the result complained of, which was the real and efficient cause of the injury."

Recurring to the answer there are allegations to the effect that the prior mortgage was indexed in the name of the grantees therein, showing also the book and page of the registry. In the deed or written bargain and sale, conveying the timber to Moore & Moore, the immediate grantors of plaintiff, there was distinct reference to the prior mortgage to Carter & Keith from Jackson & Blackburn, vendors, to Moore & Moore; that plaintiff's attorneys, in making their examination and whose knowledge and opportunity to know will be imputed to plaintiff, took a copy of the bill of sale and included same in their report on the title, and that "any sums of money advanced to Moore & Moore was done with full knowledge of said paper-writing and in face of the recitations that Carter & Son and Keith held a mortgage on the timber for $6,000; and further, that if plaintiff did not have actual notice of said mortgage it was due to his own negligence and carelessness and not to any act or conduct of this defendant" (the register of deeds), and under the principles heretofore stated the issue of liability is, in our opinion, distinctly raised

and must be determined on the question whether the default, charged and admitted by the register, of not fully indexing and cross-indexing the prior encumbrance, was the proximate cause of pecuniary loss to plaintiff or was the same due to his own negligent default on the facts known to him or which he should have known if reasonably attentive to his own interest. And on the question of damages, it does not necessarily follow that plaintiff is entitled to recover the sum of $1,241.15, with some accrued interest, the difference between the amount advanced and that paid back by the debtor, as his Honor ruled. The jury may award that sum but it does not follow as a conclusion of law from the facts in evidence. On a breach of duty of this kind, causing injury, the plaintiff may recover the damages that were probable under the facts as they existed and which can be ascertained with a reasonable degree of certainty. The default complained of here was the failure to index and cross-index a prior mortgage, by reason of which plaintiff was misled and induced to take a second contract and mortgage, to his injury, and the damages would properly be referred to the existence of such prior mortgage and its effect on plaintiff's security. The only witness examined on the trial was J. N. Bryant, one of the plaintiffs, and, while his evidence tended to show that the Moores, plaintiff's debtors for their outlay, were insolvent, it is not an inference that the court can draw from his testimony, and while there is allegation that the prior mortgage had been foreclosed, leaving nothing subject to plaintiff's claim on the timber, that allegation is denied in the answer, and we do not recall any evidence tending to show such a foreclosure. In addition to this, it is admitted that plaintiff held the second mortgage on this timber to reimburse him for the $2,000, and it is nowhere shown in the evidence that the timber is not of sufficient value both to satisfy the prior encumbrance and also to reimburse the plaintiff. In an action of this character it is incumbent on plaintiff to establish both the injury and the amount of the loss, and though liability be established, the damage will be only nominal unless the loss be shown or facts presented from which it can be reasonably ascertained. *Johnson v. Bryce et al.,* 102 Wis., 575; *Gordon v. Stanley,* 108 La., 182; *Titleguar Co. v. Commonwealth,* 141 Ky., 570; *Appleby v. State of New Jersey,* 45 N. J. L., 161; *State ex rel. Phillips v. Greene et al.,* 112 Mo. App., 108; 2 Sutherland on Damages (3d Ed.), sec. 488; 1 Sedgwick (9th Ed.), sec. 107-107a.

On the record, we are of opinion that the cause must be referred to the jury both on the question of liability and the amount of damages, and to that end a new trial is awarded.

New trial.

NOTE.—BROWN, J., did not sit in any case at this term, being absent on account of illness.

HISTORY

OF THE

SUPREME COURT

OF

NORTH CAROLINA

BY

CHIEF JUSTICE, WALTER CLARK

4 JANUARY

1919

HISTORY OF THE SUPREME COURT OF NORTH CAROLINA

By Chief Justice Walter Clark

Prior to the adoption of our republican form of government in 1776 we had for the colony a supreme common law and equity court, styled "The General Court," which was a trial court. There was no court of appeals. The presiding officer of this was styled Chief Justice, who presided with an indefinite number of assistants who were laymen. They were probably merely advisers, for there was no statute defining their powers. When the Lords Proprietors met at the Cockpit in London on 21 October, 1669, under the fanciful Constitution drawn up by the famous John Locke, they chose Anthony Ashley Cooper, afterwards the famous Earl of Shaftesbury, as the Lord Chancellor and first Chief Justice of this colony. This was an honorary appointment, and he named as his representative John Willoughby as the first Chief Justice in this colony.

The first record that we have of any general court is that held in 1694, at the house of Thomas White, though there must have been sessions in the years prior thereto. The Chief Justice at that time was also Governor, Thomas Harvey. This court held jurisdiction of criminal and common-law cases, and also as a court of equity. Down to 1868, when the distinction between law and equity was abolished, the same judges held the courts of law and the courts of equity, though the distinction between the two as separate jurisdictions was kept up.

By the Court Bill of 1746 the seat of government was fixed at New Bern. Following the English system, all writs and processes were issued from that court, but they were returnable and triable before *nisi prius* terms to be held by the Chief Justice twice a year at three points—at Edenton, in the Northern Circuit; at Wilmington, in the Southern Circuit; and at the courthouse in Edgecombe in the Western Circuit. The supreme and principal court continued to be held twice a year at New Bern, and was styled the General Court. This latter consisted of the Chief Justice and three Associates appointed by the Governor. In 1713 Christopher Gale was Chief Justice. He was born in Yorkshire, England, and was the son of the rector of a church. The late Colonel George Little of Raleigh was his lineal descendant. He was succeeded by Tobias Knight, who was accused (but acquitted) of complicity with the pirate "Blackbeard," and he by Frederick Jones, of indifferent fame. Gale on his return from England was again appointed. In 1724 Governor Burrington removed him and appointed Thomas Pollock, but the Lords Proprietors reinstated Gale. In 1729 the Lords Proprietors ceded their rights to the crown, and in 1731 Gale was superseded by William Smith, who had been educated at an English

University, and had been admitted to the bar in England.

Governor Burrington appointed John Palin to succeed Smith, and then William Little, who was the son-in-law of Gale. On his death Daniel Hamner became Chief Justice, who in turn was replaced by William Smith, who had come back from England. In 1740 John Montgomery became Chief Justice, and was succeeded in 1744 by Edward Moseley, a man of real ability. He died in 1749, and his successors were in turn Enoch Hall, Eleazer Allen, James Hazel, and Peter Henly.

In 1746 an important change was made by the court law of that year. Up to that time the Chief Justice had sat with from two to ten assistants who were simply justices of the peace, and it is not certain even that all the Chief Justices were lawyers. Even down to the present time, though in fact since 1771, all of the judges of the Superior and Supreme Court have been lawyers, there has never been, at any time, any provision of the Constitution requiring this. Under the Act of 1746, however, three associates were appointed in lieu of the former lay assistants, and they were required to be "learned in the law."

Charles Berry became Chief Justice in 1760, and committed suicide in 1766. In 1767 the province was divided into five judicial districts—Edenton, New Bern, Wilmington, Halifax, and Hillsboro—in each of which towns a court was held twice each year by the Chief Justice and his Associates. The Chief Justice was Martin Howard, and the Associates were Richard Henderson and Maurice Moore. Judge Henderson was the father of Chief Justice Leonard Henderson, and Judge Moore was the father of Justice Alfred Moore of the United States Supreme Court. Chief Justice Martin Howard, on the outbreak of the Revolution, sided with the Tories and returned to Rhode Island, whence he had come. The Court Act of 1767 expired at the end of five years, and by reason of disagreement between the Governor and the Legislature there were no courts in the province between 1773 and 1777. After August, 1775, till the Judiciary Act, adopted 15 November, 1777, by the new State Government, the judicial functions were discharged by the committees of public safety.

Under the Provincial Government the Chief Justice was a member of the Upper House of the General Assembly, and also aided largely in the executive functions. On the other hand, the Governor granted letters of administration, probate of wills, and had other judicial jurisdiction. The Constitution of 1776, on the contrary, made both the executive and judiciary elective by the General Assembly, which was chosen annually. The Constitution of 1868 made the Supreme and Superior Courts constitutional offices and beyond repeal by legislative action. It also made the judges elective by the people for the term of eight years.

By the Judiciary Act of 1777 the State was divided into six districts—Wilmington, New Bern, Edenton, Halifax, Hillsboro, and Salisbury. In 1782 Morganton was added, and in 1787 Fayetteville, making eight in all. In each of these a court was held twice each year by the three judges jointly. The first judges selected were Samuel Spencer of Anson, Samuel Ashe of New Hanover, and James Iredell of Chowan. Iredell, who was later a Justice of the United States Supreme Court, soon resigned, and was succeeded by John Williams of Granville. Judge Ashe was elected Governor in 1795, but Spencer served till his death in 1794, and Williams died in 1799. Judge Spencer's death was singular. In old age he was asleep on a warm day in a chair under the shade of a tree. A turkey gobbler enraged by the red handkerchief which the judge had placed over his face to keep off the flies, assaulted him, causing his death.

In 1790, Halifax, Edenton, New Bern, and Wilmington districts were constituted the Eastern Riding, and Morganton, Salisbury, Fayetteville, and Hillsboro the Western. The number of judges was increased to four, by the election of Judge Spruce McKay, and two judges were assigned to hold the courts, jointly, in each riding.

The Constitution of 1776 provided that the General Assembly should by joint ballot appoint judges of the Supreme Court who should hold during good behavior. The General Assembly seemed to consider that, there being no appellate court, the Superior Court filled this requirement, for there was no appellate court until one was created in 1799, consisting of all the Superior Court judges, to continue for one year, the object being to try James Glasgow, Secretary of State, and others for fraud in the issuance of land scrip in Tennessee to Revolutionary soldiers. At the expiration of one year the act was continued in force by chapter 12, Laws 1801, which provided, among other things, section 3: "No attorney should be allowed to speak or admitted as counsel in the aforesaid court." This was a repetition of a similar prejudice against lawyers which found expression in Locke's "Fundamental Constitutions of Carolina," March, 1669, which provided, section 70, that no one could plead for another in any court for money or reward. We have outlived those days, though there is still some prejudice naturally surviving against so necessary and influential a profession as ours.

This court was styled the "Court of Conference." In 1804 the court was required to file written opinions, and in 1805 the title was changed to the "Supreme Court," a tardy recognition of the constitutional provision of 1776, and the sheriff of Wake County was made marshal of the court.

In 1806 the ridings were increased to six by the election of two addi-

tional judges, and a Superior Court for the first time was required to be held twice a year in each county by a single judge.

Till 1856 these judges met and themselves allotted the ridings, the only restriction being that no judge should hold the same riding twice in succession. In 1857 this was changed to require the judges to hold every district in the whole State in regular rotation. By the Constitution of 1868 judges of the Superior Court each held only his own district. In 1878 this was changed back to require the Superior Court judges to ride the entire State in rotation. In 1910 the number of districts having been increased to 20, it was felt to be a hardship that a judge should ride his own circuit only one time in twenty, and that it was an anomaly that a judge should be required for nineteen-twentieths of his time to preside over people who had had no hand in his nomination, and the State, as in 1790, was divided into two divisions, the judges to rotate in holding only the districts of their respective divisions. Further changes in that direction are desirable and will doubtless be made.

In 1810 the judges hearing appeals in conference were authorized to elect a Chief Justice, and John Louis Taylor was the first and only judge to fill that position. A seal and motto were directed to be established by the court and the right of appeal was prescribed. Any two judges of the six, sitting in conference at Raleigh, were a quorum.

In November, 1818, the Supreme Court, contemplated forty-two years before by the Constitution of 1776, was at last created by legislative enactment, the bill being introduced by Hon. William Gaston, afterwards one of the most illustrious members of the court. The salary of the judges was fixed at $2,500 each, the salary of the Governor at that time being $1,900, and the salary of the Superior Court judges, previously $1,650, was raised to $1,800. The judges of the Superior and Supreme Courts were elected by the Legislature and held for life till 1868, when these courts were created in the Constitution, without liability of abolishment by the Legislature as formerly, and the judges were made elective by the people for the term of eight years.

The Supreme Court, created in 1818, began its existence 1 January, 1819. Its first session was held 5 January, 1819. John Louis Taylor, Leonard Henderson, and John Hall were elected, who chose Taylor for Chief Justice. John Louis Taylor was at that time the oldest judge in commission on the Superior Court bench, having been elected in 1798. He was born in London of Irish parentage, 1 March, 1769. At twelve years of age he was brought to this country by his elder brother, and received his education in part at William and Mary College in Virginia, but left before graduation. He was admitted to the bar in 1788, located in Fayetteville, and was chosen a member of the Legislature from that town, which elected a borough member, for four terms.

He removed to New Bern in 1796. He died in Raleigh in January, 1829.

Leonard Henderson was born in that part of Granville County which is now Vance, in 1772. His sister married Judge Spruce McKay, already mentioned, and his niece became the wife of Judge Boyden of the North Carolina Supreme Court. He was elected to the Superior Court in 1808 and resigned in 1816. Elected to the Supreme Court as above, he became Chief Justice in 1829, and died in August, 1833.

John Hall, the third member of the court, was the senior of the other two, having been born in Augusta County, Virginia, in May, 1767. His father was a native of Ireland. He was a graduate of William and Mary College. He removed to Warrenton, N. C., in 1792, and in 1800 was elected a judge of the Superior Court, and of the Supreme Court as above stated, on its organization. He resigned in December, 1832, and died in January, 1833.

On the death of Chief Justice Taylor, John D. Toomer was appointed by the Governor to the bench, and Judge Henderson was elected by his associates, Chief Justice.

In the meantime Archibald D. Murphey, of the Superior Court, under a provision in the act creating the court, was detailed by the Governor, by special commission, to sit in the cases where any one of the three incumbents was disqualified to sit because of having been counsel in any cause. Judge Murphey was thus assigned by Governor Branch and sat in several cases. His concurrence with Chief Justice Taylor against Judge Hall's dissent sustained the validity of the Moses Griffin will, under which New Bern has ever since possessed the "Griffin School." Judge Murphey has always been very dear to the people of this State. He was the son of Colonel Archibald Murphey, a Revolutionary soldier of Caswell County. He was born in 1777 and graduated at the University of North Carolina with the highest distinction in 1799. From 1812 to 1818 by annual election he was Senator from Orange. He was the originator of the system of internal improvements and common schools in this State. He purposed to write a history of North Carolina. In 1818 he narrowly missed election to the Supreme Court and was chosen to fill one of the vacancies on the Superior Court. His oration before the two literary societies of the University of North Carolina in 1827 was the first of a long series of these and has never been surpassed by any. Under the common law barbarism of imprisonment for debt, this distinguished man, who reflects so much honor on his State, was for some months in Guilford jail, without any fault on his part. He died in 1832.

John D. Toomer was born in Wilmington, March, 1784; was educated in part at the University of North Carolina, but did not graduate.

He was elected judge of the Superior Court in 1818, but soon resigned. On the death of Chief Justice Taylor in 1829 he was appointed by Governor Owen to the Supreme Court till the Legislature met, which chose Thomas Ruffin to succeed him. Judge Toomer was afterwards in the State Senate and a member of the Constitutional Convention of 1835. In 1836 he was again elected judge of the Superior Court, but resigned in 1840. He died in Pittsboro in 1856.

Thomas Ruffin was born in Virginia in November, 1787. He was the son of a Methodist minister. He was educated at Princeton University. He studied law under Judge Murphey and was admitted to the bar in 1808, locating in Hillsboro. In 1813, 1815, and 1816 he was a member of the House of Commons from the borough of Hillsboro, and in the last-named year was Speaker, and was chosen judge of the Superior Court, but resigned after two years service. The first seven volumes of North Carolina Reports, down to the creation of the separate Supreme Court, 1 January, 1819, were by volunteer reporters. The act creating the court authorized the court to appoint the reporter. The first of these was Judge Murphey. Later Judge Ruffin was one of the reporters. In the summer of 1825 he was again elected judge of the Superior Court, but resigned after three years service, when in 1828 he was chosen president of the State Bank at Raleigh. In December, 1829, he was chosen by the Legislature to the Supreme Court. On the death of Chief Justice Henderson in 1833 and the appointment of Judge Gaston, he was chosen by his associates Chief Justice, and served for nineteen years, resigning from the court in 1852. In 1858, on the death of his successor, Chief Justice Nash, he was called by the almost unanimous vote of the General Assembly, though then in his seventy-second year, again to the Supreme Bench, and took his place as Associate Justice. Eighteen months later he again resigned and died in 1870 in his eighty-third year. He raised a family of thirteen children. One of his sons, Thomas Ruffin, Jr., became a judge of the Superior and Supreme Courts.

Joseph J. Daniel, born in Halifax County in 1784, was at the State University, but did not graduate. He studied law under General William R. Davie at Halifax. He represented that borough and the county in the General Assembly. He was elected to the Superior Court in 1816 and, after sixteen years of service, on the death of Judge Hall was elected to the Supreme Court. He died in February, 1848. His opinions are notable for brevity and point. He died in 1848.

For eleven years, 1833 to 1844, Ruffin, Daniel and Gaston sat together on the Supreme Court bench, and it has never been surpassed in ability and reputation. Yet that court rendered an erroneous decision, *Hoke v. Henderson,* 15 N. C., 1 (in 1833), which gave infinite trouble till, after

seventy years, it was overruled. It held that an office was property. This decision was not followed by any other State and its doctrine was denied by the United States Supreme Court. Still such was the veneration felt for the court that it was cited with approval more than sixty times; but, however, after being questioned in a series of dissenting opinions which called attention to its being opposed to our entire theory of government, it was finally overruled (in 1903) in *Mial v. Ellington,* 134 N. C., page 131. During its existence as authority no case ever caused more inconvenience in the administration of our State Government than this.

William Gaston was born in New Bern in 1778. His father was a native of the North of Ireland, of Huguenot descent, and graduated at the Edinburgh Medical College. Chief Justice John Louis Taylor married Judge Gaston's sister. Gaston served in the State Senate, represented the borough town of New Bern in the House of Commons, and was speaker of that body. He was a member of Congress from 1812 to 1816. His address before the literary societies at the University of North Carolina in 1832, and at Princeton in 1834, were models of their kind. He was the author of our State hymn, "The Old North State." On the death of Chief Justice Henderson in 1833 Gaston was elected to the Supreme Court. He died suddenly at Raleigh during the session of the court in January, 1844.

On the death of Judge Gaston, Frederick Nash of Orange was elected to succeed him. He was born in New Bern in 1781, when his father, Abner Nash, was Governor, and was a nephew of General Francis Nash, who was killed at Germantown. He graduated at Princeton College with distinction in 1799. In 1808 he removed to Hillsboro and represented that borough town and also the county of Orange in the General Assembly. In 1818 he was elected judge of the Superior Court, but resigned in 1826. He was again elected to the Superior Court in 1835, and upon the death of Judge Gaston in 1844 he was elected to succeed him, being then in his sixty-fourth year. On the resignation of Chief Justice Ruffin in 1852, he was elected by his associates Chief Justice, and died in 1858 in the seventy-eighth year of his age.

William H. Battle was born in Edgecombe in October, 1802, the grandson of Elisha Battle, a prominent member of the Baptist church in this State. He was the oldest of six brothers, all of whom were educated at the University. He was appointed Reporter of the Supreme Court in 1839. In 1833 and 1834 he was a member of the House of Commons from Franklin and, together with Governor Iredell and Judge Nash, was a member of the commission which compiled the Revised Statutes. He was promoted to the Superior Court in 1839. In 1843 he removed to Chapel Hill, and in 1845 he was elected by the trustees

of the University professor of law and conducted the Law School till 1866. Among his students were three of his successors on the Supreme Bench—Davis, Shepherd, and Clark. In May, 1848, on the death of Judge Daniel, he was appointed by Governor William A. Graham to fill the vacancy till the Legislature met, which elected Richmond M. Pearson and chose Judge Battle to the vacancy created on the Superior Court bench. In 1852, upon the resignation of Chief Justice Ruffin, Judge Nash became Chief Justice, and Judge Battle was elected to the Supreme Court bench by an almost unanimous vote, irrespective of party. He filled the position till 1865 when all the State offices were declared vacant. He was then again elected to the Supreme Court and filled the post until all positions were vacated by the new Constitution in 1868, when he returned to the practice of the law. In 1876 he was chosen president of the Raleigh National Bank. In 1877 his son, Kemp P. Battle, having been elected president of the University, Judge Battle returned to Chapel Hill as Dean of the Law School. He published a Digest of the North Carolina Reports in four volumes, and edited the compilation of laws known as Battle's Revisal. He died in March, 1879, in the seventy-seventh year of his age.

Richmond M. Pearson was born in June, 1805, in Rowan; graduated at the University in 1823. He studied law under Chief Justice Henderson, and was licensed in 1826. For four years he represented Rowan in the House of Commons, and in 1835 was defeated for Congress. In 1836 he was elected to the Superior Court, to the Supreme Court in December, 1848, and became Chief Justice in 1858, and was reëlected Chief Justice by the people in 1868. His judicial career covered forty-one years of unbroken service—twelve years on the Superior Court bench and twenty-nine on the Supreme Court, nineteen of them as Chief Justice. As Chief Justice he presided at the impeachment of Governor Holden in 1871. In January, 1878, on his way to Raleigh to open the spring term of court, while crossing the Yadkin River in a buggy, he was stricken with paralysis and died at Winston, 5 January, 1878, in the seventy-third year of his age.

Matthias E. Manly was the last of the judges who ascended the bench in *antebellum days*. He was born in Chatham in 1800; graduated at the University of North Carolina in 1824; studied law under his brother, Governor Manly, and located in New Bern. He was a member of the House of Commons from that borough in 1834-1835, being the last borough representative. The six towns which enjoyed that privilege were Halifax, New Bern, Wilmington, Hillsboro, Fayetteville, and Salisbury. It was abolished by the Convention of 1835. Judge Manly was elected judge of the Superior Court in 1840, and, after faithful service of nineteen years, he was chosen to the Supreme Court, in December,

1859, to fill the vacancy caused by the second retirement of Judge Ruffin. His office was declared vacant in 1865 and Judge E. G. Reade was elected to succeed him. He was Speaker of the State Senate in 1866, and was elected by that Legislature to the United States Senate, jointly with Governor Graham, but they were not allowed to take their seats. He died in New Bern in 1881 in the eighty-second year of his age. His first wife was the daughter of Judge Gaston.

Edwin G. Reade was born in Person County in November, 1812. His father died while he was very young, and he aided to support the family by menial work on the farm and in the carriage and blacksmith shop and in the tanyard. He read law, without an instructor, in books kindly loaned to him, and received license to practice in 1835. He was elected to Congress in 1855, but declined a reëlection. In 1863 he was appointed by Governor Vance to the Confederate States Senate, and in the same year was chosen judge of the Superior Court. In 1865 he was elected by the Legislature to the Supreme Court to succeed Judge Manly, being the last judge chosen by the General Assembly. In 1866 and 1867 he was elected Grand Master of the Masons. In 1868 the Supreme Court having been enlarged by the new Constitution to consist of five members, Chief Justice Pearson and Judge Reade were chosen by the people to succeed themselves, with W. B. Rodman, R. P. Dick, and Thomas Settle as their Associates. Judge Reade's term expired 1 January, 1879, when he was chosen president of the Raleigh National Bank, then somewhat embarrassed. Like Chief Justice Ruffin, under similar circumstances, he restored the credit of the bank. In 1865 he was elected almost unanimously to the State Convention and was elected its president by acclamation. It is said that in his prime he had no superior as an advocate in this State before a jury. He was on the Supreme Court thirteen years. He died in Raleigh, 18 October, 1894, in his eighty-second year.

Judge William B. Rodman was born in Washington, N. C., in June, 1817. He graduated at the University of North Carolina at the head of his class in 1836; read law with Judge Gaston and was licensed to practice in 1838. He was captain of heavy artillery at New Bern in March, 1862; was quartermaster in Branch's brigade, but was soon appointed on a military court with the rank of colonel. He was elected to the Convention of 1868 and, with Tourgee and Victor Barringer, was on the commission which prepared the new Code of Civil Procedure. He was elected by the people in 1868 to the new Supreme Court, and under the construction the court gave to the terms of the judges first elected under the Constitution, he served for ten years, and retired to practice law in 1879. He died in March, 1893.

Judge Robert P. Dick was born in Greensboro in October, 1823. His

father, Hon. John M. Dick, was judge of the Superior Court for nearly thirty years from 1832 till his death in October, 1861. Judge Dick graduated at the University of North Carolina in 1843; read law with his father and was admitted to the bar in 1845. He was United States District Attorney from 1852 till 1861. He was a member of the State Convention of 1861, and signed the Ordinance of Secession. He was State Senator from Guilford in 1864, and was appointed United States District Judge in 1865, but resigned because unable to take the "iron-clad" oath. In March, 1867, he was a member of the convention which organized the Republican party in this State, and in April, 1868, he was elected justice of the Supreme Court. In June, 1872, he was appointed United States District Judge for the newly created Western District of North Carolina. He died in September, 1898.

Thomas Settle was born in Rockingham County in 1831. His father, Thomas Settle, was a member of Congress from 1817 to 1821; speaker of the House of Commons, 1827-8, and judge of the Superior Court from 1832 till his resignation in 1854. The subject of this sketch graduated at the University of North Carolina in 1850; read law with Judge Pearson, with whom he afterwards sat on the Supreme Court, and was licensed to practice in 1854. He was a member of the Legislature from 1854 to 1859. He was Speaker of the House in 1858; and an elector on the Buchanan ticket in 1856. He entered the war in 1861 as captain of a company in the Thirteenth North Carolina Regiment. At the end of a year's service, he resigned upon his election as solicitor of his district, which position he occupied till 1868. He was a member of the Convention of 1865. In April, 1868, he was elected to the Supreme Court, but resigned in February, 1871, on his appointment as Minister to Peru. On his return from Peru in 1872 he was president of the Republican National Convention which nominated Grant for a second term. On the resignation of Judge Dick, Judge Settle, in December, 1872, was reappointed judge of the Supreme Court by Governor Caldwell, but resigned in 1876 upon his nomination as candidate for Governor against Vance. He was appointed United States District Judge for Florida in January, 1877, and died in that office 1 December, 1888, in the fifty-eighth year of his age. One of his sisters married David S. Reid, Democratic Governor and United States Senator, and another was the wife of O. H. Dockery, Republican candidate for Governor in 1888.

Nathaniel Boyden was born in Conway, Mass., 16 August, 1796. He was a soldier in the War of 1812. He entered Williams College in 1817 and graduated in Union College, New York, in July, 1821. His father was a Revolutionary soldier who died in 1857, being ninety-four years of age.

Judge Boyden came to Guilford County in 1822. He was admitted to the bar in 1823 and represented Surry in the House of Commons in 1838 and 1840. In 1844 he represented Rowan in the State Senate, and in 1847 he was elected a member of the Thirtieth Congress. He declined reëlection and continued to practice law till raised to the bench. He attended forty-eight courts each year and practiced regularly in twelve counties. He was a member of the State Convention of 1865, and in 1868 was elected as a Republican to the Fortieth Congress. Upon Judge Settle's first resignation he was appointed by Governor Caldwell, in May, 1871, to the Supreme Court. He was then in his seventy-fifth year. He died in 1873 after a service of two and one-half years.

William P. Bynum was born in June, 1820, in Stokes County. He graduated at Davidson College with the highest honors, in 1843; he read law with Judge Pearson, with whom he afterwards sat on the Supreme Court, and was admitted to the bar in 1844. His license was the last signed by the lamented Gaston, who died so suddenly. In 1861 he was appointed by Governor Ellis lieutenant-colonel of the Second North Carolina Regiment. His future associate on the Supreme Court, Judge Faircloth, was quartermaster of this regiment. Judge Bynum was in the battles around Richmond and at the first battle of Fredericksburg. After the death of Colonel Tew he became colonel. Early in 1863 he was elected solicitor, and returned home. He filled that position for eleven years, till he was appointed to the Supreme bench on the death of Judge Boyden, and served till the expiration of his term, 1 January, 1879, when he returned to practice in Charlotte, where he died 30 December, 1909, in his ninetieth year.

William T. Faircloth was born in Edgecombe in January, 1829, and graduated at Wake Forest College in 1854. His means were limited and he taught school in vacation to pay his expenses in college. He studied law with Judge Pearson and was admitted to the practice in 1856 and located in Goldsboro. He served during the war as quartermaster, and surrendered at Appomattox. He was a member of the Convention of 1865, and of the succeeding Legislature, by which he was elected solicitor. He was a member of the State Convention of 1875, as were Judges Avery and Shepherd. In November, 1876, he was appointed by Governor Brogden to the Supreme Court to fill the vacancy caused by the second resignation of Judge Settle. His term expired 1 January, 1879, and he returned to practice in Goldsboro. He was defeated in 1884 for Lieutenant-Governor on the Republican ticket, and in 1890 he was the candidate of the same party for justice of the Supreme Court against Justice Walter Clark, and was again defeated. In 1894 he was nominated by the Republicans and Populists and elected

Chief Justice. He died suddenly at his home in Goldsboro, 30 December, 1900.

William Nathan Harrell Smith, sixth Chief Justice, was born in Murfreesboro in September, 1812. His father was a native of Connecticut, a graduate of Yale, and a physician, who removed to this State in 1802 and died in 1813. Judge Smith graduated at Yale in 1834 and studied law in its law school. Among his college-mates were Morrison R. Waite, later Chief Justice of the United States Supreme Court, W. M. Evarts, since Secretary of State; Samuel J. Tilden and Edwards Pierrepont, Minister to England. He obtained license to practice law in North Carolina, but soon removed to Texas. After a stay of six months he returned to this State and served in both Houses of the General Assembly, by which, in 1848, he was elected solicitor and served eight years. He was elected to Congress in 1858, and though it was his first term came within one vote of being elected Speaker. He served in the Confederate Congress the four years of the war. In 1870 he removed to Norfolk to practice law, but in 1872 he removed to Raleigh. Upon the death of Chief Justice Pearson he was appointed Chief Justice in January, 1878, by Governor Vance, and in June he was nominated for Chief Justice and elected for a term of eight years, and eight years later the bench, then consisting of Smith, Ashe, and Merrimon, were reëlected, the first two being then each in his seventy-fifth year. He died in November, 1889.

The court, from 1868 to 1 January, 1879, consisted of five judges, all of whom were Republicans except Judge Smith, who was appointed in January, 1878, to fill out the unexpired term of Chief Justice Pearson. The court was reduced 1 January, 1879, to three in number, all Democrats, Judge Smith being reëlected, with Judge Thomas S. Ashe and John H. Dillard as Associates.

Thomas S. Ashe was born in July, 1812, in Alamance and was a great grandson of Judge Samuel Ashe, already mentioned as one of the three judges who constituted the entire judiciary of North Carolina from 1777 to 1795, when he became Governor. Judge Thos. S. Ashe graduated at the University of North Carolina in 1832 in the same class with James C. Dobbin, Secretary of the Navy under President Pierce, and United States Senator Thomas L. Clingman. He studied law under Chief Justice Ruffin and located at Wadesboro in 1836. He represented his county in both branches of the General Assembly and was solicitor from 1848 to 1852. He declined the nomination for Congress in 1858. During the war he was a member of the Confederate Congress, both in the House and Senate. He was a Democratic candidate for Governor in 1868, but was defeated by Governor Holden. In 1872, and in 1874, he was elected to the United States Congress. In 1878 he was elected

to the Supreme Court of North Carolina to succeed Judge Reade, and in 1886, was renominated by acclamation and reëlected, being then in his seventy-fifth year. He died in Wadesboro in 1887.

John H. Dillard was born in Rockingham County in November, 1819. For a year and a half he was at the University of North Carolina, but left on account of ill health and graduated at the Law School of William and Mary in 1840; he began the practice of law in Virginia, but returned to this State in 1846. In 1862 he entered the army as captain in the Forty-fifth North Carolina Regiment and served one year. In 1868 he removed to Greensboro; in 1878 he was elected to the Supreme Court, but resigned in February, 1881, after a service of a little more than two years. He died in Greensboro, 6 May, 1896.

Thomas Ruffin, the fourth son of Chief Justice Thomas Ruffin, was born at Hillsboro in September, 1824. He graduated at the University of North Carolina in 1844. He read law under his father and began practice in Caswell County. He represented Rockingham in the Legislature, and in 1856 he was elected Solicitor, serving four years. In 1861 he entered the army as a captain in the Thirteenth North Carolina Regiment, but in October, 1861, he was appointed by Governor Clark a judge of the Superior Court to fill the vacancy caused by the death of Judge John M. Dick. He rode the fall circuit, but resigned in March, 1862, being appointed lieutenant-colonel of his regiment. He was wounded at South Mountain, September, 1862, and resigned the following March. Later he was appointed a member of the army court in the Army of the West. After the war he was a partner with Judge Dillard and John A. Gilmer at Greensboro, but his health becoming impaired, he abandoned the practice and removed to Hillsboro where he became an insurance agent. In 1875 he returned to the bar and formed a partnership with John W. Graham. Upon the resignation of Judge Dillard in February, 1881, he was appointed to the Supreme Court, and the next year was nominated and elected. He resigned in September, 1883, to resume the practice of law. He died at Hillsboro in 1889.

Augustus S. Merrimon was born in Transylvania County in September, 1830. In 1860 he was elected to the House of Commons, and in 1861 he entered the army as quartermaster with the rank of captain, but was soon elected solicitor and served till the end of the war. He was elected a judge of the Superior Court in 1866, but resigned in August, 1867, rather than obey orders issued by military authority. He was a candidate of the Democratic party for the Supreme Court in 1868, but was defeated with his ticket. He was candidate for Governor in 1872 and was again defeated, but in 1873 he was elected United States Senator and served till 1879. On the resignation of Judge Ruffin in

1883 he was appointed to the Supreme bench and was reëlected at the next election. On the death of Chief Justice Smith, November, 1889, he was appointed by Governor Fowle Chief Justice and served three years, till his death in November, 1892.

Joseph J. Davis was born in April, 1828, in what is now Vance County. His grandfather was a soldier in the Revolution. He attended Wake Forest College one year and then went to the University of North Carolina, but did not graduate. He read law under Judge Battle and was admitted to the bar in 1850. In 1862 he entered the army as captain in the Forty-seventh North Carolina Regiment and was taken prisoner in Pettigrew's charge at Gettysburg, 3 July, 1863, and was a prisoner till near the close of the war. In 1866 he was elected to the Legislature from Franklin, and in 1874 he was elected a member of Congress from the Raleigh district and served six years. In 1887, upon the death of Judge Ashe, he was appointed to the Supreme Court and was nominated and elected to the same position the following year. He died in August, 1892.

Alphonso C. Avery was born in 1835 in Burke; graduated at the University of North Carolina in 1857; studied law under Chief Justice Pearson; was admitted to the bar in 1860; served in the Confederate Army, rising to the rank of major; was State Senator in 1866 and a member of the Constitutional Convention in 1875; was elected judge of the Superior Court in 1878 and was reëlected in 1886; upon the increase of the Supreme Court to five in number he and Judge Shepherd were elected the two additional judges and took his seat in January, 1889. At the expiration of his term, 1 January, 1897, he returned to the practice and died in Morganton in June, 1913.

James E. Shepherd was born in Nansemond County, Virginia, 26 July, 1845. During the war he was a telegraph operator in Virginia. He studied law under Judge Battle; was admitted to the bar in 1869, and was a member of the Constitutional Convention of 1875. He was appointed to the Superior Court by Governor Jarvis in August, 1882, and, by subsequent election, he continued until promoted to the Supreme Court, where he took his seat 1 January, 1889. On the death of Judge Merrimon he was appointed by Governor Holt, in November, 1892, Chief Justice, but was defeated at the election in 1894, and returned to the practice in January, 1895. He died at a hospital in Baltimore, where he had gone for treatment, in February, 1910.

Walter Clark was born in Halifax County, 19 August, 1846; graduated at the University of North Carolina in 1864; saw service in the war 1861-5 (except one year while at the University of North Carolina), attaining the rank of lieutenant-colonel. When the number of the Superior Court judges was increased from 9 to 12 in 1885, he was

appointed by Governor Scales, 15 April, 1885, one of the additional Superior Court judges and was elected in 1886 by the people. Upon the appointment of Judge Merrimon as Chief Justice he was appointed by Governor Fowle to succeed him as Associate Justice of the Supreme Court, 16 November, 1889, and was elected by the people for the unexpired term in 1890. In 1894 he was elected for the full term of eight years, being nominated by the Democratic party and endorsed by the Republican and Populist parties. In 1902 he was nominated and elected Chief Justice and was renominated and reëlected in 1910 and in 1918.

James C. McRae was born in Fayetteville, October, 1838, and was licensed to practice law in 1859. He saw service in the Confederate Army, 1861-65, reaching the rank of major. He was elected to the Legislature in 1874. He became judge of the Superior Court in July, 1882, and at the expiration of his term in 1890 he returned to the bar. Upon the death of Judge Davis he was appointed by Governor Holt, in August, 1892, to succeed him, and was elected for the unexpired term. He was defeated for reëlection by the Republican nominee in 1894, and returned to the practice of law. In 1900 he accepted the position of professor of law at the University of North Carolina, where he died in October, 1909.

Armistead Burwell was born in Hillsboro in October, 1839, the son of Rev. Robert Burwell, the Presbyterian pastor at that place. He graduated at Davidson College in 1859, with first honors, and was engaged in teaching in Arkansas when the war broke out. He served throughout the war with troops from that State, reaching the rank of captain, and was severely wounded in 1864 before Atlanta. He resumed teaching in Charlotte after the war, studied law and was licensed to practice in 1869; he was State Senator in 1880. He was appointed by Governor Holt to the Supreme Court in November, 1892, but was defeated in the election by the Republican candidate in 1894, and resumed practice at Charlotte, where he died in May, 1913.

David M. Furches was born in Davie County in April, 1832. His grandfather, Tobias Furches, was a prominent Baptist preacher. Judge Furches was educated at Union Academy in Davie and studied law under Chief Justice Pearson, obtaining license to practice in the Superior Court in 1857. He located in Mocksville, where he was county attorney, removing to Statesville in 1866. He was a member of the State Convention in 1865; was defeated for Congress in 1872; for the Supreme Court in 1888; and for Governor in 1892. He was appointed judge of the Superior Court in 1875 to succeed Anderson Mitchell, and served till January, 1879. He was elected to the Supreme Court as a Republican and took his seat 1 January, 1894. Jointly with Judge Douglas, he was impeached by the Legislature of 1901 for issuing an

order to the State Treasurer to pay out money which had been forbidden by an act of the Legislature, *White v. Auditor,* 126 N. C., 570. The charge was sustained by a majority of the Senate, but did not receive the necessary two-thirds vote to convict and remove from office. He resumed the practice of law at the end of his term in 1903 and died in 1908.

Judge Walter A. Montgomery was born in Warrenton in February, 1845. He served in the Twelfth North Carolina Regiment, 1861 to 1865, being promoted to second lieutenant in 1864, and was paroled at Appomattox. He was admitted to practice in 1867. In 1873 he removed to Memphis, Tenn., but returned to this State in 1876. In 1894 he was elected to the Supreme Court to fill an unexpired term for two years, and in 1896 he was elected for the full term of eight years. On its expiration he returned to the practice, 1 January, 1905.

Robert M. Douglas was born in January, 1849. He was the son of Stephen A. Douglas, who was United States Senator from Illinois and candidate for President in 1860. He was Private Secretary to the Governor of North Carolina in 1868 and Private Secretary to President Grant, 1869 to 1873, and United States Marshal of North Carolina, 1873 to 1883. In 1886, then 37 years of age, he was admitted to the bar; in 1896 was elected to the Supreme Court for the term of eight years, and at the end of his term returned to practice at Greensboro. He died in February, 1917.

Charles Alston Cook was born in Warrenton in October, 1848. He was at the University of North Carolina, but graduated at Princeton in 1870; represented his county in both Houses of the General Assembly; was United States District Attorney in 1889 to 1893. In January, 1901, he was appointed by Governor Russell to the Supreme Court, to fill the unexpired term of Judge Furches, appointed Chief Justice. His term expired 1 January, 1903. He removed to Muskogee, Oklahoma, where he became a member of the House of Representatives, and died in 1917.

Platt D. Walker was born in Wilmington 25 October, 1849; was a student at the University of North Carolina; studied law at the University of Virginia and was admitted to the bar in 1870; he practiced law in Richmond County and moved to Charlotte in 1876. He was elected Associate Justice of the Supreme Court, taking his seat 1 January, 1903; was reëlected in 1910 and in 1918.

Henry G. Connor was born at Wilmington, July, 1852; was admitted to the bar in 1873; was a member of the State Senate and House, being Speaker of the latter in 1899. He was judge of the Superior Court eight years, 1885 to 1893. He was elected Associate Justice of the Supreme Court and took his seat 1 January, 1903. Was appointed

United States District Judge for the Eastern District of North Carolina, 1 June, 1909, which position he still fills.

George H. Brown was born in Washington, N. C., May, 1850. He was educated at Horner's School at Oxford and was admitted to the bar in 1873. He was judge of the Superior Court, 1889 to 1904, and was elected to the Supreme Court, taking his seat 1 January, 1905, and was reëlected in 1912.

William A. Hoke was born at Lincolnton, 25 October, 1851; educated at private schools; studied law under Chief Justice Pearson, and was admitted to the bar in 1872. He was State Senator in 1889, and judge of the Superior Court, 1891 to 1904; elected to the Supreme Court, taking his seat 1 January, 1905, and was reëlected in 1912.

James S. Manning was born in Pittsboro in June, 1859; graduated at the University of North Carolina, where he studied law and was admitted to the practice in 1880, locating at Durham. Was a member of the State House of Representatives in 1907 and State Senate in 1909. He was appointed by Governor Kitchin, in June, 1909, to fill the unexpired term of Judge Connor, returned to the practice of law 1 January, 1911, and was elected Attorney-General for term beginning January, 1917.

William R. Allen was born at Kenansville in March, 1860; graduated at Trinity College, N. C.; studied law under his father and was licensed to practice law in 1881, locating at Goldsboro. He represented Wayne in the General Assembly in 1893, 1899, and 1901; he was appointed judge of the Superior Court in August, 1894, but was defeated by his Republican opponent and returned to the practice 1 January, 1895. He was again elected to the Superior Court and served eight years, from 1 January, 1903, when having been elected to the Supreme Court, he took his seat there 1 January, 1911, and was reëlected in 1918.

The Supreme Court of North Carolina, as a separate organization and not merely as a court of conference of Superior Court judges, began 1 January, 1819. It therefore rounded out a century 1 January, 1919. It has had, including the present incumbents, forty judges. The court consisted of three members from 1 January, 1819, to 1868. It was composed of five judges from 1868 to 1 January, 1879; it then consisted of three judges to 1 January, 1889, and since that date of five judges. Of the forty judges Chief Justice Taylor was born in England; Chief Justice Ruffin, Shepherd and Judge Hall in Virginia; Judge Boyden in Massachusetts; the other thirty-five were natives of this State.

Chief Justice Ruffin was in his eighty-third year when he died, Judge Manly in his eighty-second, and Judge Bynum in his ninetieth—all three after their retirement; but Chief Justice Taney of the United States Supreme Court died in office in his eighty-eighth year, soon after deliver-

ing the opinion in the *Merryman case,* and Lord Halsbury is still the highest judicial officer in England, chairman of the Law Committee in the House of Lords, in his ninety-fifth year.

Judge Settle was the youngest judge, ascending the bench at thirty-seven. Next came the elder Ruffin, Pearson, Murphey, Shepherd, and Clark, who all went on at forty-three. Judge Furches went on at sixty-two, becoming Chief Justice at sixty-eight; Judge Nash at sixty-three, and was in his seventy-second year when made Chief Justice.

Judge Smith went on the bench at sixty-five, and Judge Ashe at sixty-six, as was Faircloth when taking his seat a second time, after an interval of sixteen years. Judge Boyden was seventy-four when appointed, and yet served two and a half years. Smith and Ashe were in their seventy-fifth year when elected a second time. There is probably no other case of two out of three judges of the highest court of a State being reëlected at such age. The longest service (except the writer's) has been Pearson's, twenty-nine years and three weeks, and the elder Ruffin, nearly twenty-five years (counting both times he was on the bench), and each of these was nineteen years Chief Justice. The writer has been on the Supreme Court since 16 November, 1889.

As to religious persuasion, three have been Roman Catholics, Gaston, Manly and Douglas; two Baptists, Faircloth and Montgomery; four Methodists, Merrimon, Clark, Cook, and Allen; seven Presbyterians, Nash, Reade, Dick, Smith, Dillard, Avery, and Burwell; one Free-thinker, and the remaining twenty-three Episcopalians.

For the first fifty years—1818 to 1868—the judges were chosen for life by the General Assembly. For the last fifty years—1868 to 1918—they have been elected by the people and for terms of eight years. During the first fifty years, 13 judges ascended the Supreme Bench of whom Judge Gaston was the only one who had not seen previous service on the Superior Court Bench. Of the 27 judges who have gone on the Supreme Court during the last fifty years, 15 went direct from the bar to that bench, i. e., Rodman, Dick, Settle, Boyden, Bynum, Faircloth, Smith, Ashe, Dillard, Davis, Burwell, Montgomery, Douglas, Walker and Manning. Three—Chief Justice Ruffin, Settle, and Faircloth—after leaving the bench for some years—afterwards returned to it.

Gaston, Boyden, Smith and Reade had previously served in the U. S. Congress and Chief Justice Merrimon in the U. S. Senate. Reade and Ashe served in the C. S. Senate and Ashe and Smith in the C. S. House.

Judges Dick, Settle and Connor were appointed to the U. S. District Court while members of the State Supreme Court.

Judge Boyden had been a soldier in the War of 1812 though he was not appointed to the Supreme Court till 1871, in his seventy-fifth year.

Thirteen saw service in the Confederate Army—Rodman, Settle, Bynum, Faithcloth, Dillard, Ruffin, Jr., Merrimon, Davis, Avery, Clark, Burwell, and Montgomery.

The Superior Court in 1777 consisted of three members, and notwithstanding the requirement for a Supreme Court in the Constitution of 1776 remained the sole court of higher jurisdiction for forty-two years. It was gradually increased from three judges in 1777 to eight judges in 1868, when the Constitution increased the number to twelve. On 1 January, 1879, this number was reduced to nine, which was again increased to twelve in 1885. In 1901 it was increased to sixteen, and in 1913 to twenty. In 1915 the State was divided into two divisions and the Superior Court judges were required to rotate by holding successively only the districts in their own division instead of the entire State.

The Superior and Supreme Courts were legislative creations till 1868, the judges being elected by the Legislature for life terms. The Constitution of 1868 made them constitutional officers, elective by the people for terms of eight years. The number of Supreme Court judges is fixed by that instrument, but the Legislature can increase or diminish the number of Superior Court judges. In the event of a vacancy, either on the Superior or Supreme Court bench, the Governor appoints until the vacancy is filled at the next general election.

RALEIGH, N. C., 4 January, 1919.

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NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words italics in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ACCOMPLICE. See Intoxicating Liquors, 6.

ACCORD AND SATISFACTION. See Deeds and Conveyances, 6; Appeal and Error, 30.

ACCOUNTING. See Limitation of Actions, 4.

ACCOUNTS. See New Trials, 1; Appeal and Error, 48.

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ACTIONS. See Corporations, 5; Removal of Causes, 1, 2; Compromise, 1, 2; Indemnity, 1; Taxation, 1; Judgments, 1, 2; Husband and Wife, 1, 2; Estates, 2, 4, 6; Pleadings, 4; Elections, 2; Limitation of Actions, 5; Domicile, 2, 4; Municipal Corporations, 3, 9; Receivers, 1, 3; Slander, 2, 4; Contracts, 4, 8; Appeal and Error, 44; Vendor and Purchaser, 3.

1. *Actions — Misjoinder — Deeds and Conveyances.*—A cause of action against a grantee of lands to set aside the deeds under which he claims and to recover damages for cutting timber on the lands is improperly joined with a cause of action against his grantor to repudiate the latter's deed and recover the purchase price of the lands, the two causes being inconsistent and may not be prosecuted at the same time. *Lanier v. Lumber Co.*, 200.

2. *Same—Lands—Title—Damages— Equity— Following Purchase Price.*—A. conveyed the lands in controversy to B., who conveyed it to C.: *Held*, the plaintiff could not maintain in the same action the position that the deed from A. was fraudulent, and recover the purchase price, and at the same time follow that paid by B. into the hands of A. and hold C. liable in damages for cutting the timber upon the lands, the liability of C. necessarily being based upon the ground that B. acquired the title and had conveyed it to him, for this would permit the plaintiff to claim the purchase money of the land, and also the land and timber. *Ibid.*

3. *Actions—Parties—Statutes—Interpretation—Department of Agriculture—Drainage Districts—Moneys Advanced.*—The State Department of Agriculture, where out of its funds the State Treasurer has advanced money for the compensation and expenses of the drainage surveyors, etc., under ch. 67, Laws of 1911, may maintain an action against the drainage district and its commissioners according to the method provided by the statute, the acceptance of the money by the drainage district under the law implying the promise to repay it; and the objection that the commissioners of the district had not authorized the transaction is untenable. *Board of Agriculture v. Drainage District*, 222.

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4. *Actions—Parties—Drainage Districts—Statutes—Refund of Moneys—State Treasurer—Motions—Supreme Court.*—In an action against the commissioners of a drainage district by the State Board of Agriculture (brought under ch. 236, Laws of 1909) to recover moneys advanced by the State Treasurer to a drainage district under sec. 14, ch. 67, Laws of 1911, the State Treasurer is a proper, if not a necessary party, and his motion made in the Supreme Court that he be made a party plaintiff is granted, the money sought to be recovered in the action, when paid into the State Treasury, to be held for the benefit of the other plaintiff and to be paid out as directed by the law. *Ibid.*

5. *Actions—Suits—Cloud on Title—Statutes—Estates—Remainders.*—One claiming the fee-simple absolute title to lands under a devise may maintain his action, under the provisions of our statute, to remove, as a cloud upon his title, the claims of others that the devise was only of a life estate with remainder over to themselves. *Nobles v. Nobles*, 243.

6. *Actions—Joinder—Ejectment—Lessor and Lessee—Contracts—Dower—Statutes.*—Where a widow has taken possession of lands during the continuance of a lease made thereof by her deceased husband, the owner, claiming under and included in an allotment of her dower, and the lessee sues in ejectment and for damages the widow individually, as administratrix and as guardian for their minor child, and sole heir at law, the cause of action alleged as to all arose from the same transaction, the lease, and were properly joined under the provisions of the Revisal, sec. 469 (1), and to prevent a multiplicity of suits. *Ingram v. Corbit*, 319.

ADJOURNMENTS. See Courts, 7, 8.

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APPEAL AND ERROR. See Usury, 1; New Trials, 1; Condemnation, 2, 3; Attachment, 1; Criminal Law, 3; Evidence, 2, 17; Trials, 1; Costs, 1, 4; Instructions, 1, 2, 4, 9; Verdict, 4; Judgments, 4; Fraud, 1; Negligence, 7; Banks and Banking, 4; Evidence, 13; Pleadings, 14; Courts, 6.

APPEAL AND ERROR—*Continued.*

1. *Appeal and Error—Wills—Production of Wills—Statutes—Fragmentary Appeals.*—Where the clerk of the Superior Court erroneously refuses the respondent's motion to dismiss the proceedings to compel the production of a will (Revisal, sec. 3134), and the Superior Court judge sustains the action of the clerk, an appeal therefrom to the Supreme Court is not fragmentary, and the court will order the rule to be discharged. *Williams v. Bailey*, 38.

2. *Appeal and Error—Reference—Findings.*—Exceptions to the findings of fact set out in a referee's report approved by the trial judge will not be considered on appeal when supported by legal evidence. *Dorsey v. Mining Co.*, 60.

3. *Appeal and Error—Reference—Findings—Vendor and Purchaser—Damages—Counterclaim.*—Where the referee finds, upon legal evidence, that the purchaser of timber had paid his vendor for all damages caused to the latter's property in cutting timber from his lands, the findings, when sustained by the trial judge, are conclusive, and his exception to the allowance of his counterclaim for them will not be considered on appeal. *Ibid.*

4. *Appeal and Error—Objections and Exceptions—Reference—Admissions.* Where a party to a reference has excepted and preserved his right to a trial by jury, but the uncontroverted matters are determinative of the action, this right becomes immaterial. *Gurley v. Woodbury*, 70.

5. *Appeal and Error—Reference—Exceptions—Evidence.*—There must be an exception to the insufficiency of the evidence to support the referee's findings of fact for such findings to be considered in the Supreme Court on appeal; and where in an action to recover lands the referee has found sufficient adverse possession to ripen the title in the appellee, and has also found that the disputed location of the *locus in quo* was covered by his paper title, either finding, where the sufficiency of the evidence is not excepted to, will sustain the judgment rendered adversely to the appellant when otherwise there is no error urged or found. *Eggers v. Stansbury*, 85.

6. *Appeal and Error—Instructions.*—When a charge, construed as a whole, is not to the appellant's prejudice it will not be considered as reversible error on appeal. *Mfg. Co. v. Bldg. Co.*, 103.

7. *Appeal and Error—Instructions—Inadvertence—Harmless Error.*—A slight inadvertence of the trial judge in his instructions to the jury which does not change the sense of the charge, construed as a whole, or tend to mislead the jury, will not be held as substantial or prejudicial error. *Ibid.*

8. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—An erroneous statement by the trial judge of the contentions of the parties must be called to his attention at the time to afford him an opportunity to correct it, or it will not be considered on appeal. *Ibid.*

9. *Appeal and Error—Verdict Set Aside—Evidence—Former Decision.*—Where a plaintiff has been nonsuited in an action on a draft on the ground that the draft had not matured at the time of the commencement of the action, and the nonsuit has been affirmed on appeal, it is erroneous for the trial judge to set aside a negative finding of the jury

APPEAL AND ERROR—*Continued.*

upon the issue as to the statute of limitations, in a second action brought within the statutory period after maturity of the instrument. *Moore v. Hawkins*, 113.

10. *Appeal and Error—Issues—Instructions—Verdict Set Aside—Harmless Error—Verdict.*—Where the jury have answered the first issue as to the defendant's indebtedness on a draft in an action between the original parties in the negative, and there was allegation and conflicting evidence as to whether the draft was for value, with correct instruction thereon as to how the jury should find in either event, the finding of the jury in the negative upon this issue disposes and renders immaterial the action of the judge in setting aside a negative answer to the second issue as to the statute of limitations and rendering judgment on the first issue. *Ibid.*

11. *Appeal and Error — Assignments of Error — Instructions — Verdict — Harmless Error.*—Where the jury have rendered a verdict of manslaughter against the defendant on trial for homicide, errors assigned relating to the charge of the court as to murder in the second degree of murder are regarded as immaterial on appeal. *S. v. Keever*, 115.

12. *Appeal and Error— Evidence— Instructions— Harmless Error.*—Error committed by the trial judge in permitting the solicitor to argue to the jury on a trial for larceny, that evidence admitted only for the purpose of impeaching the defendant was substantive evidence, is cured by an instruction that the evidence could only be considered by them for the purpose of impeachment. *S. v. Lunsford*, 117.

13. *Appeal and Error—Evidence—Objections and Exceptions—Competent in Part—Harmless Error.*—Where husband and wife are tried for a criminal offense, testimony that her husband in her presence "began to talk pretty ill" is too indefinite to be a ground of error, and where it is competent against the husband a general exception to its admission by the wife will not be considered on appeal under Rule 27, especially where nothing prejudicial to her appears. *S. v. Fain*, 120.

14. *Appeal and Error—Supreme Court—Counterclaim—Consent of Counsel —Judgments.*—Where plaintiff's attorneys consent, in the Supreme Court, to a judgment as on a counterclaim, not pleaded or urged in the lower court, this entry may be made in the lower court when the certificate of the judgment on appeal is filed there. *Craddock v. Brinkley*, 126.

15. *Appeal and Error— Objections and Exceptions— Instructions.*—Exception to a charge of the court which was free from error and which covered the case and was correct in principle, that it was not sufficiently full and explicit, without any special request for instructions in the respects complained of, will not be considered on appeal. *Alexander v. Cedar Works*, 138.

16. *Appeal and Error—Objections and Exceptions—"Contentions."*—Objection that the trial judge did not correctly state the appellant's contention should be made at the time, and otherwise it will not be considered on appeal. *Ibid.*

17. *Appeal and Error — Questions and Answers — Leading Questions.*—No error on appeal will be found the exclusion by the trial judge of a

APPEAL AND ERROR—*Continued.*

leading question asked by a party of his own witness. *Beardly v. Camp Mfg. Co.*, 153.

18. *Appeal and Error—Indefinite Objection and Exception—Exception to Charge Containing Two Propositions, One Correct and the Other Not —Instructions.*—Exceptions to the judge's charge, embracing two separate propositions, one of which is correct, is too broad, and will not be considered on appeal. *Ibid.*

19. *Appeal and Error—Objections and Exceptions—Estates—Contingent Interests—Purchaser.*—In proceedings under Pell's Revisal, sec. 1590, to sell lands affected with presently unascertainable contingent interests in remainder, it is not open to objection by the purchaser at the sale, regularly had and in conformance with the statute, that the decree of the court was inequitable to the life tenant as to the proportion of interest on the proceeds of the sale, as such objection is open only to the party affected, and is not essential to the purchaser's title. *Dawson v. Wood*, 159.

20. *Appeal and Error—Court's Discretion—Both Parties in Default—Costs.* In this case, where a demurrer was filed before the clerk to a written motion asking to set aside a judgment in proceedings for the partition of lands, it is *Held*, as the demurrer would probably not have been interposed if the petition had been drawn with more regard for the rules of pleading, as to certainty and precision, both parties are somewhat in default, and the court, in the exercise of its discretion, directs the costs of the appeal to be equally divided between them. *Hartsfield v. Bryan*, 166.

21. *Appeal and Error—Remarks of Counsel — Prejudice — Correction—Instructions—Attorney and Client.*—While improper and prejudicial remarks by counsel to the jury upon matters not embraced in the issues are ordinarily sufficient grounds for the granting of a new trial on appeal, the prejudice thus created may be removed by the prompt and clear instructions of the trial judge bearing thereon; and when it appears from the evidence, charge and circumstances of the case that the verdict had not been prejudicially influenced, a new trial will not be ordered. *Featherstone v. Cotton Mills*, 159 N. C., 429; *Norris v. Cotton Mills*, 154 N. C., 480, cited and distinguished. *Holt v. Mfg. Co.*, 170.

22. *Appeal and Error—Negligence—Contributory Negligence—Instructions —Evidence.*—Where the evidence tends only to show that the plaintiff's intestate was thrown to his death while standing on the steps of the caboose car to a freight train, holding to a grab-iron, preparatory to getting off, in the usual course of his employment, to throw a switch; that the conductor had locked the car behind them and was standing behind him at the time: *Held*, exception that the charge failed to submit to the jury the question of intestate's contributory negligence in not holding to the grab-iron and in going upon the steps is unsupported by the evidence and untenable. *Weldon v. R. R.*, 179.

23. *Appeal and Error— Verdict— Evidence — Objections and Exceptions.*— Objection that a verdict is not supported by any legal evidence comes too late after its rendition; and this doctrine applies where the jury has asked further instructions while considering the case, as to whether they were confined to the contentions of the parties as to the

APPEAL AND ERROR—*Continued.*

true divisional line between owners of adjoining lands, in the presence of attorneys of each of them, who agree in an instruction that the jury shall find the line, but upon the evidence in the case. *Nall v. McMath*, 183.

24. *Appeal and Error—Objections and Exceptions—Instructions—Evidence.* While ordinarily a mistake of the trial judge in endeavoring to rehearse the testimony, or give the evidence of a witness, or the admission of the parties, should be called to his attention at the time to afford him timely opportunity to correct it, or it will not be reviewed on appeal, a misstatement that there is no evidence as to a material and controlling question in controversy does not fall within the rule, and will be held for reversible error. *Royal v. Dodd*, 206.

25. *Appeal and Error—Rules of Court—Docketing Case—Dismissal.*—A motion for a *certiorari* to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed under Rule 17 for the failure of the appellant to have his case docketed seven days before entering upon the call of the docket by the Supreme Court of the district to which it belongs, as required by Rule 5. *Cox v. Lumber Co.*, 227.

26. *Appeal and Error — Settlement of Case — Time Extended — Courts — Agreement of Council.*—The requirement as to the time of settling cases on appeal is statutory, without authority of the courts to extend it, though the parties may extend it by agreement, this practice is discouraged. *Ibid.*

27. *Appeal and Error—Judgments Set Aside—Findings—Excusable Neglect —Meritorious Defense.*—In setting aside a final judgment for excusable neglect it must be properly made to appear on appeal that the negligence was excusable, and also that the defendant had a meritorious defense, with findings by the trial judge on both of these matters; and while his findings of fact are conclusive when supported by evidence, the questions of whether they or each of them are sufficient to constitute the required grounds are matters of law and reviewable on appeal. *Land Co. v. Wooten*, 248.

28. *Appeal and Error—Frivolous Appeals—Dismissal—Landlord and Tenant—Parol Lease—Statute of Frauds—Consideration.*—When it appears on appeal from a judgment of the Superior Court against the defendant in summary ejectment that the only grounds relied on for his continuing in possession is an oral contract, void under the statute of frauds and without consideration, the appeal will be dismissed as frivolous and for the purpose of delay. *Barnes v. Saleeby*, 257.

29. *Appeal and Error—Demurrer—Fragmentary Appeals—Objections and Exceptions—Judgments.*—On appeal from an order overruling a demurrer to the complaint only those grounds of objection which, if sustained, would dismiss the action, or cover the entire case, or would finally dispose of it, will be considered; and where the suit is to remove a tax deed as a cloud upon the plaintiff's title to lands, and, among other grounds of demurrer taken, there is one, a ruling upon which does not dispose of the case, an exception as to this should be entered and reserved for final judgment, an appeal therefrom being fragmentary, and where such grounds as permit of appeal have been

APPEAL AND ERROR—*Continued.*

held untenable, the other will not be passed upon. *Headman v. Comrs.*, 261.

30. *Appeal and Error—Instructions—Accord—Presumptions.*—Where the charge of the trial judge is not set out in the record on appeal, and no exceptions taken thereto, it will be presumed that it correctly charged the law applicable to the evidence of the case. *Bank v. Wysong & Miles Co.*, 284.

31. *Appeal and Error—Evidence—Unanswered Questions.*—Exceptions to the exclusion of questions asked a witness upon the trial of a cause will not be considered on appeal when it does not appear what the answer would have been or the character of the evidence excluded. *Ibid.*

32. *Appeal and Error—Courts—Discretion—Leading Questions.*—The exclusion of leading questions is within the discretionary power of the trial judge, and not reviewable on appeal. *Ibid.*

33. *Appeal and Error — Technical Error — Prejudice — Harmless Error.*—Technical error in excluding evidence on the trial of a cause is not reversible when it appears that it was not materially harmful to the appellant. *Ibid.*

34. *Appeal and Error—Objections and Exceptions.*—The Supreme Court, on appeal, will not separate the competent from the incompetent and prejudicial evidence embraced by one exception, and grant a new trial for the admission of that which is incompetent. *Nance v. Telegraph Co.*, 313.

35. *Appeal and Error— Evidence— Corroboration— Restrictions— Instructions—Exceptions.*—Exception that evidence admissible only for the purpose of corroborating a witness should have been so confined on the trial of the action, must be to the refusal of the court to give a requested prayer for instruction properly worded and aptly tendered, or it will not be considered on appeal. *Ibid.*

36. *Appeal and Error— Reference— Findings— Evidence.*—The findings of facts by the referee, supported by evidence and approved by the trial judge, are not reviewable on appeal. *Hilton v. Gordon*, 342.

37. *Appeal and Error—Verdict Set Aside—Matters of Law—Findings of Error—New Trial—Discretion.*—Where the trial judge sets aside a verdict of the jury for errors committed in appellant's favor on the trial and not as a matter within his discretion, which course is not approved (*Shives v. Cotton Mills*, 151 N. C., 294), he should state separately at the time of the trial or in the case on appeal the several rulings he thinks erroneous which induced his action. *Powers v. City of Wilmington*, 361.

38. *Same— Presumptions— Assignments of Error— Objections and Exceptions—Record.*—On appeal from an order of the trial judge setting aside a verdict of the jury for errors he thinks he has committed on the trial, wherein he has not severally stated them, his action will not be reversed unless the appellant shows error, the presumption being in favor of the correctness of the rulings in the lower court; and the exceptions should be made to properly appear of record, not only of the appellant but of the appellee, and the former should assign as error the refusal of his motion for judgment upon the verdict and the

APPEAL AND ERROR—*Continued.*

order setting the verdict aside, on the grounds that there had been no erroneous ruling against the appellee upon the trial. *Ibid.*

39. *Appeal and Error—Issues—Courts—Immaterial Issues.*—It is not error for the trial judge to withdraw from the consideration of the jury issues which had been submitted to them but immaterial to the inquiry. *Anderson v. Anderson*, 401.

40. *Appeal and Error—Reference—Attachment—Presumptions—Findings.* Where the referee has found, in an action wherein the defendant's property had been seized under an attachment, that the attachment was valid, and the trial judge has ruled, upon full consideration of the report, that it had been properly issued, and there are no special findings made by or requested of him, the Supreme Court, on appeal, will assume that he found the necessary facts, under the evidence, to support his order. *Mfg. Co. v. Lumber Co.*, 404.

41. *Appeal and Error—Reference—Findings—Evidence.*—The findings of fact by a referee, which were made upon sufficient evidence and fully considered and approved by the trial judge, will not be reviewed in this Court on appeal *Ibid.*

42. *Appeal and Error—Contempt—Courts—Statutes.*—A willful disobedience of the process or order of the Superior Court to desist from the doing of an act obstructing the lawful working of a public road, is not a contempt committed within the immediate presence or verge of the court, and an appeal will lie to this Court from the judgment of contempt. Rev., secs. 939, 940. *In re Parker*, 463.

43. *Same—Findings—Evidence.*—The facts found by the judge of the Superior Court in adjudging a party guilty of a contempt for disobedience of its order committed not in the immediate presence or within the verge of the court are conclusive on appeal, when supported by legal evidence, which in this case is held to be more than sufficient. *Ibid.*

44. *Appeal and Error—Verdict—Cause of Action—Damages—Harmless Error—Physicians and Surgeons—Malpractice.*—Where the jury have rendered their verdict in the defendant's favor in an action for damages against a physician for malpractice in unskillfully and negligently diagnosing and operating upon a married woman for tumor, mistaking pregnancy for it, the admission of evidence as to whether hernia resulted from the operation, addressed to the separate issue of damages, is harmless, if erroneous and without prejudice, for upon the failing of the cause of action no damages are therein recoverable. *Brewer v. Ring and Valk*, 477.

45. *Appeal and Error—Objections and Exceptions—Evidence—Experts—Courts.*—Objection that a witness, who has not properly qualified as an expert, has been offered and testified as such, comes too late when such special ground is stated for the first time after the verdict, though a general exception had been taken, as the trial judge should be afforded an opportunity to hear and determine upon the qualifying evidence, and would no doubt have heard evidence upon the question if the matter had been properly called to his attention. *Ibid.*

46. *Appeal and Error—Instructions—Directing Verdict—Evidence—Inference.*—Where the trial judge instructs the jury, in an action of *devisavit vel non*, that they should decide for the caveators if they found

APPEAL AND ERROR—*Continued.*

the facts to be as testified, the evidence must be taken as true and considered in the light most favorable to the propounders, and it constitutes reversible error if there is any inference of fact from the evidence, which the jury may have drawn, that would have sustained the validity of the writing as the will of the decedent. *In re Will of Margaret Deyton*, 494.

47. *Appeal and Error—Record—Deeds and Conveyances—Probate.*—The Supreme Court will not pass upon the sufficiency of the probate to a deed, under the requirement of Revisal, sec. 998, the validity of which is called in question, when it has not been made to appear in the record on appeal. *Dorsey v. Kirkland*, 520.

48. *Appeal and Error—Case Remanded—References—Account—Credits.*—It appearing on appeal from a judgment rendered upon the report of a referee that the appellant has not been given advantage of certain material admissions the case will be remanded for that purpose. *Williams v. Kearney*, 531.

49. *Appeal and Error—Reference—Findings—Case Remanded.*—The report of the referee, supported by evidence and approved by the trial judge, is conclusive on appeal; but the Supreme Court may remand the case for additional, more definite or fuller findings as to certain items when such cause appears to be required. *Ibid.*

50. *Appeal and Error—Prejudice—Harmless Error—Objections and Exceptions—Court's Discretion.*—The erroneous admission of evidence not prejudicial to the appellant is not reversible error; and where objection is made too late it is discretionary with the trial judge as to whether he will strike it out, and his action thereon is not reviewable on appeal. *S. v. Pitts*, 543.

51. *Appeal and Error—Instructions—Verdict—Harmless Error—Murder.*—Where there is evidence sufficient for the consideration of the jury for a conviction of the prisoner, being tried for homicide, of murder in both the first and second degree, error, if any committed by the trial judge, in instructing the jury upon the law relating to murder in the first degree is cured by the verdict convicting the prisoner of the lesser crime. *S. v. Evans*, 564.

52. *Appeal and Error—Instructions—Trials—Argument—Race Prejudice.*—Where the solicitor, upon a trial for a homicide wherein the defendant was a colored man, has argued to the jury that a white man, who was a disinterested witness, had testified to certain facts, exception that his remark tended to prejudice the jury on account of race or color cannot be sustained, it appearing that the trial judge instructed the jury in strong and forceful language, among other things, that it would be "cowardly perjury" for them to be influenced by such consideration, which removed any prejudice, if any, that might otherwise have been caused. The charge of the court upon this subject is not objectionable. *Ibid.*

53. *Appeal and Error—Objections and Exceptions—Trials—Ground for Objections.*—The appellant will be confined, on appeal, to the ground of objection stated on the trial, and where the exception is to the remarks of the solicitor to the jury upon the trial for a homicide, which were perfectly proper in one aspect, we cannot sustain an exception

APPEAL AND ERROR—*Continued.*

which was taken after the trial that they were prejudicial upon another ground. *Ibid.*

54. *Appeal and Error—Objections and Exceptions—Brief—Rules of Court.* Exceptions not set out in appellant's brief are deemed to have been abandoned on appeal. Rule 34. *S. v. Coble*, 588.

55. *Appeal and Error—Instructions.*—An instruction of the judge favorable to the appellant will not be considered on appeal. *S. v. Gash*, 595.

56. *Appeal and Error—Instructions—Reinstructions.*—While a closing part of an instruction as to the credibility of a witness, a defendant in a criminal action, might be capable of misconstruction by the jury, it will not be held for reversible error when the judge has recalled the jury to correct it, and further instructed them to acquit him if the evidence in his favor raised a reasonable doubt, and that they should give his testimony the same weight as that of any other witness. *Ibid.*

ARGUMENT. See Trials, 2, 3; Appeal and Error, 52.

ARREST. See Criminal Law, 5; Homicide, 6.

Arrest—Sheriffs and Constables—Officers—Summons to Assist—Disobedience—Criminal Law—Misdemeanor—Statutes.—One willfully disobeying an order to assist in making an arrest, given by one he knows to be an officer duly authorized to make it, is guilty of a misdemeanor within the intent and meaning of our statute (Revisal, sec. 3701), such officer not being required to give the one so summoned the name of the party to be arrested or any other information concerning the matter. *S. v. Ditmore*, 592.

ARREST OF JUDGMENT. See Indictment, 1, 2.

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ASSIGNMENT. See Contracts, 13; Insurance, Life, 2.

ASSIGNMENTS OF ERROR. See Appeal and Error, 11, 38.

ASSUMPTION OF RISKS. See Verdict, 2.

ATTACHMENT. See Appeal and Error, 40.

1. *Attachment—Reference—Fraud—Evidence—Appeal and Error.*—Where the affidavit in attachment alleges that the defendant was shipping beyond the State manufactured lumber in breach of his contract with the plaintiff not to do so, but to transfer the bills of lading to him, and was continuing to do so, secretly, surreptitiously and in a hasty manner, it is sufficient to sustain a finding of the trial judge, in passing upon the report of the referee, that the attachment had properly been issued, and renders immaterial and harmless a similar finding of the referee upon the same question; and in passing upon the question of the sufficiency of the evidence to sustain the finding of fraud, some latitude will be allowed on appeal, in support of the finding. *Mfg. Co. v. Lumber Co.*, 404.

ATTACHMENT—*Continued.*

2. *Attachment—Custodia Legis—Judgment—Execution—Evidence—Fraud —Statutes.*—Where defendant's property has been seized under attachment in an action and held in *custodia legis* until final judgment in plaintiff's behalf, and the decision upon the question as to whether there was sufficient evidence of fraud to sustain the attachment having been adverse to the defendant and approved by this Court, the effect of an execution upon the judgment, when placed in the sheriff's hands, Rev., sec. 784, is that of a *venditioni exponas* to sell the property which had been seized in attachment. *Ibid.*

3. *Same—Issues.*—Where property of the defendant has been seized and is held in *custodia legis* under a writ of attachment until judgment is rendered in the main action, if plaintiff recovers, it is the duty of the sheriff, under the statute, to sell the property seized in attachment, when execution is issued upon the judgment and received by him. *Ibid.*

4. *Attachment—Decisions—Res Judicata—Judgments.*—A decision on a motion to vacate an attachment is *res judicata* until reversed. *Ibid.*

ATTORNEY AND CLIENT. See Motions, 1; Appeal and Error, 21; Judgments, 7; Register of Deeds, 2.

AUTOMOBILES. See Negligence, 1.

BACK FIRES. See Negligence, 6.

BANKS AND BANKING. See Compromise, 2; Usury, 2, 4.

1. *Banks and Banking—Controller of Currency—Orders—Shares of Stock —Values.*—The decision of the controller of the currency as to an impairment of the capital stock of a bank is conclusive and final on the stockholders and the courts. *Gurley v. Woodbury*, 71.

2. *Banks and Banking—Bills and Notes—Checks—Nonpayment—Notice of Dishonor—Liability.*—A bank received on deposit a check of its customer on another bank and sent it to its correspondent bank for collection. The check was not paid by the bank on which it was drawn and the correspondent bank was negligent in not notifying the forwarding bank for more than a month of its nonpayment and in sending it to the payee bank for collection: *Held*, the liability of the correspondent bank to the forwarding bank did not solely depend upon whether the check would have been paid in due course had it been presented, but also whether the forwarding bank could have protected itself from the maker, or otherwise, had it been promptly notified. *Bank v. Trust Co.*, 254.

3. *Banks and Banking—National Banks—Garnishment.*—A garnishment of funds by a creditor of one having funds in a national bank will lie, and is not objectionable on the ground that the bank is a national bank. *Markham-Stephens Co. v. Richmond Co.*, 364.

4. *Banks and Banking—Bills and Notes—Purchaser for Value—Collection —Evidence—Instructions—Appeal and Error.*—Where a bank interpleads, claiming to be the purchaser of a draft for value from the drawer, and entitled to the money paid thereon in the hands of the collector bank, and there is no evidence that the interpleader had ever had any other transaction with the drawer, and the only evidence

BANKS AND BANKING—*Continued.*

is that the interpleader was a purchaser for full value, etc., an instruction is reversible error that the interpleader would only be a collection agent if it received the draft, expressly or impliedly from its course of dealings, with the right to charge it back to the drawer should it not be paid, and refuse to instruct that they should answer the issue for the interpleader if they believed the evidence in the case. *Ibid.*

BENEFICIARY. See Insurance, Life, 2.

BETTERMENTS. See Leases, 1; Husband and Wife, 7, 8.

BIAS. See Evidence, 1.

BILLS AND NOTES. See Banks and Banking, 2, 4.

BOND ISSUES. See Statutes, 2.

BONDS. See Principal and Agent, 1, 3, 6, 8; Constitutional Law, 3, 13, 17; Statutes, 4; Indemnity, 1.

BOOK VALUES. See Compromise, 2.

BOUNDARIES. See Verdict, 3.

BREACH. See Principal and Surety, 3; Vendor and Purchaser, 2; Parties, 1; Contracts, 4, 5, 8, 9, 10, 11, 21; Deeds and Conveyances, 5.

BRIEF. See Appeal and Error, 54.

BURDEN OF PROOF. See Waiver, 1; Domicile, 1; Homicide, 1; Evidence, 6; Trusts, 1; New Trials, 2; Intoxicating Liquors, 4.

BURNINGS. See Criminal Law, 1, 2.

CANCELLATION. See Leases, 1.

CARRIERS OF GOODS.

Carriers of Goods—Connecting Carriers—Delivering Carrier—Damages—Evidence—Trials.—Evidence tending to show that the delivering carrier of a connecting line of carriers over whose lines a shipment of goods had been transported from another State for delivery here had received from the consignee the amount of freight charged for the entire routing over the various lines, is sufficient to take the case to the jury in the consignee's action against the delivering carrier for damages. The question of the carrier's liability under the principles of principal and agent, and under the Carmack amendment to the Federal statute, discussed by Clark, C. J. *Paper Box Co. v. R. R.*, 351.

CARRIERS OF PASSENGERS. See Instructions, 6.

Carriers of Passengers—Waiting Rooms—Stations—Negligence—Heat.—A common carrier of passengers is liable in damages for the sickness of a passenger caused by his having to wait for a late train, after having purchased his ticket therefor, in cold and inclement weather, in its waiting room, insufficiently heated, owing to the negligence of the carrier. *Hipps v. R. R.*, 472.

CASE REMANDED. See Appeal and Error, 48, 49.

CAVEAT EMPTOR. See Deeds and Conveyances, 7.

CHARACTER. See Criminal Law, 4; Intoxicating Liquor, 10.

CHATTEL MORTGAGES. See Contracts, 12.

CHILDREN. See Wills.

CITIES AND TOWNS. See Municipal Corporations, 1, 2, 4, 6, 7, 8; Condemnation, 1, 2, 3; Statutes, 1; Health, 1.

Cities and Towns— Ordinances— Statutes— Meat Market— Discretionary Powers—Courts—Municipal Corporations.—An ordinance of a city providing, among other things, that no permit shall issue for conducting a meat market therein unless the city manager is satisfied that the applicant is of good moral character, and that the business shall be conducted in such manner as not to create a nuisance, passed in pursuance of its charter authorizing the city to exact and enforce all ordinances necessary to protect the health, life, and property of its inhabitants, is valid, and where the manager has refused an applicant for a meat market at a certain location and the city council has passed thereon in pursuance of the ordinance, with approval, the courts will not set it aside and order a reconsideration where the discretion conferred has not been capriciously or arbitrarily exercised. Where the character and efficiency of the applicant is unquestioned, objection that the business itself not being a nuisance, the license should have been granted, is untenable, for to conduct it at the place selected might create one on account of its environment, which is a matter left to the discretion of the proper city authorities. *McIntyre v. Murphey*, 300.

CLAIM AND DELIVERY.

Claim and Delivery— Evidence— Agreement— Trials.—Testimony that a receiver appointed by the court saw the defendant, who had the possession of certain personalty claimed by the receiver, and had him surrender it to him, and then agreed to rent it from him pending the adjudication of the court as to its ownership, but thereafter, upon demand, refused to give up the property accordingly, is sujcient to sustain judgment upon a verdict in the receiver's favor. *Maultsby v. Gore*, 269.

CLERKS OF COURT. See Wills, 3; Courts, 2; Married Women, 1; Limitation of Actions, 5; Domicile, 1, 2, 4, 5.

Clerks of Court— Judgments— Motions— Terms of Court.—There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad. *Hartsfield v. Bryan*, 166.

CLOUD ON TITLE. See Actions, 5; Municipal Corporations, 9; Taxation, 5; Pleadings, 13.

COLLATERAL ATTACK. See Domicile, 2.

COLLECTION. See Banks and Banking, 4.

COLOR OF TITLE. See Evidence, 3; Deeds and Conveyances, 2; Limitation of Actions, 2; State's Lands, 1.

COMMERCE. See Telegraphs, 1.

COMMON LAW. See Courts, 3; Instructions, 8; Husband and Wife, 9; Homicide, 8.

Common Law— Presumptions— Courts— Trials— Evidence.—The laws of our sister State are applicable to the trial of a cause in our own courts when it arose there, with the presumption that the common law prevails in the absence of evidence to show otherwise. *Hipps v. R. R.*, 472.

COMPROMISE. See Corporations, 7; Verdict, 4.

1. *Compromise—Subsequent Actions—Counterclaims—Actions.*—Where an action has been compromised according to the written agreement of the parties, a counterclaim in another action between them embraced in the former action and the compromise agreement of the parties cannot be maintained. *Gurley v. Woodbury*, 70.

2. *Compromise—Contracts—Banks and Banking—Shares of Stock—Book Values—Records—Actions—Corporations.*—Where the action depends upon the terms of a compromise of a former action, as to the value of certain shares of bank stock—that is, shall be the book value of the shares as shown by the records and books of said bank: *Held*, such book value should be ascertained by deducting the liabilities from the assets shown on the books and records of the bank; and it appearing that the parties had knowledge of a call of the directors to make good a deficiency of the capital stock in a certain amount, or go into liquidation, according to an order of the controller, on file as a record of the bank, the order of the controller was within the contemplation of the parties and to be considered as a record of the bank in ascertaining the book value of the shares under the terms of the agreement. *Ibid.*

COMPTROLLER OF CURRENCY. See Banks and Banking, 1.

COMPUTATION OF TIME. See Insurance, Life, 4.

CONDEMNATION.

1. *Condemnation— Municipal Corporations— Cities and Towns— Damages —Statement of Owner—Evidence—Tax Valuation.*—Where the value of lands taken by an incorporated town, in condemnation proceedings, is at issue, and the owner has testified as to their value, evidence of his own statement, made before the tax equalization board, that it was worth a much less sum, is competent in contradiction, and differs from instances wherein the value has been given in for taxation by the assessors, which, being the estimate made by others, is incompetent against the owner. *Canton v. Harris*, 10.

2. *Condemnation—Municipal Corporations—Cities and Towns—Damages —Rejected Offers—Evidence—Appeal and Error.*—Where the issue is presented as to the value of the owner's land, taken by an incorporated town in condemnation proceeding, testimony by a witness that he had offered the owner a greater price per acre than the value he claimed, in good faith, and was prepared to pay, and would have paid the price had it been accepted, is too intangible and too uncertain as

CONDEMNATION—*Continued.*

to the circumstances or conditions under which the offer was made, and its exclusion is proper. *Ibid.*

3. *Condemnation—Municipal Corporations—Cities and Towns—Separate Owners—Damages—Evidence—Appeal and Error.*—Where there are several issues addressed to the value of tracts of lands separately owned by various parties, in proceedings to condemn them by a city, and it appears that the whole was a body of mountain land, composed of contiguous tracts of the same general nature, desirable for the same purposes, and much of it, throughout, of the same or similar values, the admission of incompetent and prejudicial evidence as to the value of some of the tracts is prejudicial to the others, and its admission constitutes reversible error as to them all. *Ibid.*

CONDITIONAL FEE. See Estates, 10.

CONDITIONAL SALE. See Contracts, 12; Removal of Causes, 3.

CONDUCT. See Criminal Law, 7.

CONFLAGRATION. See Negligence, 6.

CONSENT. See Judgments, 1; Husband and Wife, 1.

CONSENT OF COUNSEL. See Appeal and Error, 14.

CONSIDERATION. See Contracts, 1, 3, 14; Corporations, 1; Receivers, 3; Pleadings, 5; Vendor and Purchaser, 3; Principal and Surety, 2, 7; Landlord and Tenant, 1; Appeal and Error, 28; Deeds and Conveyances, 13.

CONSTABLES. See Criminal Law, 5; Arrest, 1.

CONSTITUTION.

ART.

II, sec. 11. "Aye" and "no" vote, etc., necessary to validity of county bonds for road purposes when tax exceeds equation between property and poll. *Guire v. Comrs.*, 516.

II, sec. 14. Amendment to act increasing rate of interest on county bonds from 5 per cent to 6 per cent is a material change, requiring conformation to constitutional requirements. *Ibid.*

II, sec. 14. The equalization between property and poll, Art. V, sec. 1, does not apply to this section. *Wagstaff v. Highway Commission*, 354.

II, sec. 14. Act passed in accordance with this section to permit county to issue bonds, leaving discretionary with commissioners as to their retirement, payment of interest, etc., *held* an amendment fixing interest period, etc., without observing these requirements, is valid. *Ibid.*

V, sec. 1. When equation between property and poll tax has been observed, legislative sanction for county bonds for road purposes is not required. *Guire v. Comrs.*, 516.

V, sec. 1. This refers to general taxation, and not to special, Art. II, sec. 14. *Wagstaff v. Highway Commission*, 354.

V, sec. 1. A general statute, though calling itself a special one, is void if the equation between the property and poll tax is not observed. *R. R. v. Cherokee County*, 86.

CONSTITUTION—*Continued.*

ART.

V, sec. 3. "Farming" comes within the provision of this article in relation to uniformity of special taxes, and the "Cotton Warehouse Act" is constitutional. *Bickett v. Tax Commission*, 433.

V, sec. 5. County bonds for roads are for special purposes. *Parvin v. Comrs.*, 508.

VII, sec. 7. Vote of people unnecessary for county bonds for road purposes. *Ibid.*

VII, sec. 7. Issuance of county bonds for road purposes does not require legislation when equation between property and poll has been observed. *Guire v. Comrs.*, 516.

X, sec. 1. Wife may claim exemption from assets of partnership with her husband, and her failure to comply with Revisal, 2118, as amended, does not deprive her. *Grocery Co. v. Bails*, 298.

CONSTITUTIONAL LAW. See Taxation, 2; Married Women, 1; Partnership, 1; Statutes, 2; Homicide, 8.

1. *Constitutional Law—Municipal Corporations—Streets and Sidewalks—Damages—Statutes.*—An act giving to the abutting owners a right of action to recover damages caused to their lands by the grading by the city of its streets is constitutional and valid. *Keener v. Asheville*, 2.

2. *Constitutional Law—Statutes—Wills—Probate—Executors and Administrators—Deeds and Conveyances.*—Chapter 90, Laws of 1911, validating conveyances of land made prior to 1911 by nonresident executors acting under a power of sale contained in a will of a citizen of another State, etc., executed according to the laws of this State and duly proven and recorded in such other State, etc., and who had not given bond and obtained letters of administrations in this State prior to the execution of such deed, is within the constitutional authority of the Legislature, and valid. *Vaught v. Williams*, 77.

3. *Constitutional Law—Statutes—Executors and Administrators—Wills—Probate—Bonds.*—The failure of a nonresident executor to give bond or to qualify under the will in North Carolina cannot vest any interest in lands situated here in the heir at law, as such omission does not affect the validity of the will, but only the power to execute it here; and ch. 90, Laws of 1911, validating conveyances of lands in North Carolina by nonresident executors, under certain conditions, who have not qualified here or given the bond, is not unconstitutional as impairing a vested right. *Ibid.*

4. *Constitutional Law—Statutes—Courts.*—In construing an act of the Legislature with regard to ascertaining whether or not it is in conformity with the State Constitution, the purpose of the courts is to sustain its validity if it can reasonably be done; but where there is an irreconcilable conflict it is the duty of the court, under its oath, to sustain the Constitution, not the will of the legislators, who are but agents of the people. *R. R. v. Cherokee County*, 86.

5. *Constitutional Law—Taxation — Statutes — Ratification.*—Chapter 88, Laws of 1913, permitting the levy of a tax for the years 1913 and 1914, does not purport to authorize a levy of a tax in 1915 for school

CONSTITUTIONAL LAW—*Continued.*

purposes in excess of the constitutional equation between the poll and the property tax (act 5, sec. 1), or a special levy for school purposes (act 5, sec. 6), and if otherwise, it would fall within the same condemnation as sec. 9, ch. 33, Laws of 1913, and ch. 109, Laws of 1917, cannot validate the levy of 1915 by ratifying ch. 33, Laws of 1913, because the Legislature had not the original authority to enact it. *Ibid.*

6. *Constitutional Law—Statutes—Estates—Remainders—Contingent Interests—Sales.*—Pell's Revisal, sec. 1590, providing for the sale of land affected with certain contingent interests does not in its terms or purpose profess or undertake to destroy the interests of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, subject to the use of a reasonable portion of the amount for the improvement of the remainder, properly safeguarded, with reasonable provision for protecting the interest of the unascertained or more remote remainderman by guardian *ad litem*, *etc.*, and is constitutional and valid. *Dawson v. Wood*, 158.

7. *Constitutional Law—Husband and Wife—Principal and Agent—Wife's Separate Lands—Landlord and Tenant—Statutes.*—The wife, under our Constitution, is vested with the right to the custody and control of the entire crops growing on her own lands, raised thereon by her husband as her agent, subject to the rights of her tenants to their share therein under the terms of any contract. Revisal, sec. 1993. *Guano Co. v. Colwell*, 218.

8. *Constitutional Law—Equation—Poll Tax—Property Tax—Statutes—Special Tax—Highways—Public Roads.*—The equation between the property and poll tax fixed by section 1, Article V, of our Constitution, refers to the ordinary general tax for State and county purposes, and has no application to a special act of the Legislature passed in conformity with Article II, section 14 thereof, submitting the question of bonds and taxation to the qualified voters of the county for the special purpose of constructing and maintaining its public roads. *Wagstaff v. Highway Commission*, 355.

9. *Constitutional Law—Statutes—Interpretation.*—The constitutionality of a statute will be presumed, all doubts should be resolved in its favor, and it will not be declared unconstitutional by our courts unless it is so proved beyond a reasonable doubt. *Bickett v. Tax Commission*, 433.

10. *Same—Taxation—"Trades"—Cotton Ginners—Farmers—Special Tax.*—Sec. 5, ch. 168, Public Laws of 1919, entitled "An act to provide improved marketing facilities for cotton," enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be collected "through the ginner of the bale and paid into the State Treasury" to specially guarantee or indemnify the State warehouse system against loss, requiring the State Tax Commission to provide and enforce the machinery for the collection of the tax, etc.: *Held*, the act is constitutional and valid, and not in derogation of Article V, section 3 thereof, the tax contemplated being uniform upon those of the class designated, and being laid upon a trade, whether that of cotton ginning or farming, and is within the authority conferred on the Legislature to further "tax trades," etc. *Ibid.*

11. *Constitutional Law—Statutes—"Workable" Provisions—Courts.*—Whether a statute is "workable" in its intended beneficial effect is for

CONSTITUTIONAL LAW—*Continued.*

the Legislature to determine, and will not be considered by the courts in passing upon the constitutionality of the statute. *Ibid.*

12. *Constitutional Law—Taxation—State Agencies—Statutes—Mandates.*—An agency of the State, required to provide the machinery for and the enforcement of a tax to be levied under the provisions of the statute, may not pass upon the constitutionality of the act and refuse to obey its mandate. *Ibid.*

13. *Constitutional Law—Roads and Highways—Taxation—Bonds—Special Purpose—Necessary Expense.*—Chapter 284, Public Laws of 1917, authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of Article V, section 5, of our Constitution, and not within that of section 1 of the same article prescribing the limitation and equation between the property and the poll tax; and being for a necessary county expense, the vote of the people within the county is not required by our Constitution, Art. VII, sec. 7. *Parvin v. Comrs.*, 508.

14. *Constitutional Law — Amendments — Roads and Highways — Private Laws—Statutes.*—The restriction placed by the amendment of 1916 to our Constitution upon the General Assembly to pass local or private laws as to public highways has no application to the provisions of chapter 284, Public Laws of 1917, for the statute relates to the establishment of roads, ferries and bridges for the whole county at such places as deemed expedient by the local authorities charged with the duty of providing and supervising them, and not for the laying out or maintenance of a special road or erecting a certain bridge, etc. *Brown v. Comrs.*, 173 N. C., 589; *Mills v. Comrs.*, 175 N. C., 215, cited and distinguished. *Ibid.*

15. *Constitutional Law—Statutes—Taxation— Special Purpose— Necessary Expense—Vote of People.*—Chapter 286, Public Laws of 1917, is a sufficient approval by the General Assembly for the levy of a tax exceeding the constitutional limit fixed by Article V, section 1, to pay the interest on, and create a sinking fund for, bonds issued by the county for the laying out, maintenance, etc., of its public roads under the provisions of the act, though no provision for a vote of the people authorizing such levy has been made by the statute, the purpose designated being for a necessary expense within the meaning and intent of our Constitution, Art. VII, sec. 7, and not requiring it. As to whether in this case the people having voted for the bonds virtually or impliedly voted for the tax, *Quere? Ibid.*

16. *Constitutional Law—Counties—Highways—Necessary Expenses—Taxation—Limitation—Statutes.*—Debts contracted by the county for building and maintaining its highways are for necessary expenses, not requiring legislative sanction under Article VII, section 7, of our Constitution, when not exceeding the limitation of Article V, section 1, to pay the interest on the debt or provide a sinking fund for the payment of the principal; but where this limitation is exceeded the approval by legislative enactment is required, the statute determining the right of issuance with or without the vote of the people, a requirement that it should be so submitted being a statutory restriction, the constitutionality of the act depending upon whether the bill passed each

CONSTITUTIONAL LAW—*Continued.*

branch of legislation on three several days, with the "aye" and "no" vote entered on the journals on the second and third readings. Const., Art. II, sec. 14. *Guire v. Comrs.*, 516.

17. *Constitutional Law — Taxation — Statutes — Amendments — Material Changes—Bonds—"Aye" and "No" Vote.*—An amendment to an act authorizing a county to issue bonds for road construction and maintenance, which increases the rate of interest from 5 per cent, authorized by a former statute, to 6 per cent, is to effect a material change in the former law and requires, for its validity, that in its passage it should have been read on separate days, with the "aye" and "no" vote taken, entered on the journals, etc., as required by Article II, section 14, of our Constitution, this rule applying with greater force when the amendment is by separate act. *Ibid.*

18. *Same—Legislative Approval.*—Where a valid statute authorizes a county to issue bonds for a necessary expense, with the approval of the voters, in excess of the limitation on taxation prescribed by Article V, section 1, of the Constitution, with further authority to again submit the question if at first defeated, bonds issued pursuant to a later amendment materially changing the statute and which has not met the constitutional requirement as to its several readings, "aye" and "no" vote, etc., Article I, section 14, are invalid for the lack of the required legislative authority, though the approval of the voters had been obtained as authorized by the former act, but for the increased interest rate. *Ibid.*

CONTEMPT. See Appeal and Error, 42.

Contempt—Process—Order—Disobedience—Intent—Statutes.—The willful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt of court, under our statute, from which he may not purge himself by disavowing a disrespectful intent. Rev., secs. 939, 940. *In re Parker*, 463.

CONTENTIONS. See Appeal and Error, 8, 15, 16; Instructions, 2.

CONTINGENT INTERESTS. See Estates, 1, 3, 4, 5, 6, 7; Judgments, 3; Appeal and Error, 19; Constitutional Law, 6.

CONTINGENT LIMITATIONS. See Estates, 9.

CONTINGENT REMAINDERS. See Wills, 11, 12.

CONTINUANCE. See Courts, 5.

CONTRACTS. See Vendor and Purchaser, 1, 2, 3; Principal and Surety, 1, 3, 6; Estates, 5; Landlord and Tenant, 1; Parties, 1; Actions, 6; Insurance, 2; Deeds and Conveyances, 13; Indemnity, 1; Receivers, 1; Compromise, 2; Insurance, 1; Limitation of Actions, 4.

1. *Contracts—Vendor and Purchaser—Specific Performance—Consideration—Evidence.*—In a suit against the vendor in a contract to convey lands, it is not necessary to the purchaser's right for specific performance that the consideration appear in the writing. *Lewis v. Murray*, 17.

CONTRACTS—*Continued.*

2. *Contracts—Lands—Vendor and Purchaser—Written Contracts—Subject-matter—Parol Evidence.*—A contract to convey lands must contain, expressly or by necessary implication, the essential features of an agreement to sell, and describe the lands with reasonable certainty, affording data, in itself or by reference to some other written paper, that will enable the court, with the aid of extrinsic evidence, to identify the property, the subject-matter of the contract. *Ibid.*

3. *Same—Specific Performance—Consideration.*—A paper-writing, expressing upon its face the following: "Received on account of trade on home place $100 from" a certain named person, and signed by the vendor, is a sufficient contract to convey to enforce specific performance at the suit of the vendor, permitting evidence to show the purchase price, and that, of several separate tracts of land owned by the vendor in the county, there was only one of them on which he lived, and known as the home place, and that the description in the instrument corresponded therewith. *Ibid.*

4. *Contracts — Breach — Timber — Deeds and Conveyances — Damages—Actions.*—Where the vendor of standing timber has conveyed it by deed, with covenant of seisin under contract that the purchaser will manufacture it into lumber and pay therefor upon a stumpage basis, as cut, and the parties have been enjoined by the owner of the superior title of a part of the lands containing the most valuable timber, after the purchaser had cut over the remaining portion: *Held*, the purchaser was justified in stopping further performance of his contract, and his action will lie against his vendor for damages for breach of contract, wherein the rights of both parties may be determined. *Dorsey v. Mining Co.*, 60.

5. *Contracts—Breach—Fraud—Representations—Knowledge—Vendor and Purchaser.*—The right to rescind a contract is not dependent upon fraud or misrepresentations alone, and may rest on other grounds, such as breach of warranty, or mistake, or on the ground that a vendor is held to know the truth of his statements which are material and have induced the purchaser to enter into the contract. *Ibid.*

6. *Contracts—Partnerships—Evidence.*—A contract to cut or manufacture lumber between A., the owner of the timber, and B., that the latter should cut the timber at a certain price per thousand, stack the product separately at the mill, convenient for handling, etc., the former to take shingles as manufactured, and thereon advance money for the expenses of manufacture, with settlement each month for the previous month, the owner to have the cull grade of shingles, with equal division of the tar after expenses paid, does not create a partnership between the parties, so as to make the owner of the timber liable to third persons for damages caused to their lands by fire negligently set out by B. while performing his agreement. *Royal v. Dodd*, 206.

7. *Contracts—Independent Contractor—Negligence—Liability of Principal—Principal and Agent—Contracts.*—An owner of trees standing upon lands may not relieve himself from liability to the owner of the lands and adjoining owners, under the doctrine of independent contractor, for damages by fire set out by his contractor in cutting or manufacturing the timber thereon with a stationary engine having a defective smokestack or spark arrester, and throwing sparks upon combustible

CONTRACTS—*Continued.*

matter surrounding it, showing negligent construction of the engine and in the manner of operating it. *Ibid.*

8. *Contracts—Breach—Actions.*—A party to a contract can maintain an action for its breach upon averring and proving a performance of his own antecedent obligations arising on the contract, or that he was prevented from performing it by the other party or those acting for him. *Nance v. Telegraph Co.*, 313.

9. *Contracts—Breach—Evidence—Board.*—Where the plaintiff and defendant have contracted that the former will board and lodge the defendant's employees and furnish them the same kind of food that he had theretofore been furnishing his other boarders, and there is evidence, in defendant's behalf, that the food did not meet these requirements, for which reason the employees had left the plaintiff's boarding house, testimony of a witness that she had eaten at plaintiff's place before and after the employees came, and that the supper spread for them "was well cooked" and looked "nice as anybody's" was competent as tending to show that the food furnished met the requirements of the contract. *Ibid.*

10. *Contracts—Breach—Measure of Damages—Board—Waiters.*—Where damages are sought in the action for the failure of defendant's employees to board with the plaintiff, in breach of a contract to that effect, with evidence that the plaintiff had incurred additional expense to receive them, testimony that the plaintiff had hired a special waiter is competent as having the food properly served at the table, was a necessary requirement, the measure of damages being gains prevented as well as loss sustained caused by the breach, which were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. *Ibid.*

11. *Contracts—Issues—Breach—Damages.*—Where there is a denial of a breach of contract as alleged in an action thereon, with supporting evidence in favor of each party to the controversy, an issue submitted only as to the amount of damages, without one as to its breach, is disapproved. *Ibid.*

12. *Contracts—Conditional Sales—Chattel Mortgages—Deeds and Conveyances—Registration—Priorities—Statutes—Mortgages.*—A conditional sale reserving title to personal property in the vendor until the full payment of the purchase price, must be reduced to writing and registered as in case of chattel mortgages, to be available as against creditors or purchasers for value. Pell's Revisal, secs. 982, 983. *Stan v. Wharton*, 323.

13. *Same—Debtor and Creditor—General Assignment—Trusts and Trustees—Purchasers for Value.*—A trustee in a deed of general assignment for the benefit of creditors is a purchaser for value within the meaning of our registration laws, and when this deed of trust has been registered it takes priority over a written conditional sale prior executed but subsequently registered. *Ibid.*

14. *Same—Equities—Present Consideration.*—The trustee in a deed of general assignment for the benefit of creditors is a purchaser for value in contemplation of our registration law giving preference to the title acquired under a prior registered conveyance; and objection that a

CONTRACTS—*Continued.*

present consideration is required is untenable, as this principle applies only where there are equities inherent in the property itself which, if established, would defeat the title of the present owner, and does not extend or apply to claimants under conveyances coming within our registration laws, which expressly provide that priority of right shall depend upon the time of registration. Pell's Revisal, secs. 982, 983. *Ibid.*

15. *Contracts—Interpretation—Insurance—Principal and Surety.*—Doubtful and ambiguous expressions in a contract of indemnity or insurance are given a reasonable construction in favor of the insured. *Crane Co. v. Longest & Tessier Co.*, 346.

16. *Contracts—Guarantor of Payment—Liability.*—A guarantor of payment assumes an absolute and direct liability upon the failure of the principal to pay the amount as guaranteed, therein differing from a guarantor for collection, whose promise is to pay upon condition that the one thus indemnified shall diligently prosecute the principal debtor without success. *Ibid.*

17. *Contracts—Lex Loci Contractus—Courts—Decisions—Evidence—Questions of Law—Trials.*—Where the decisions of a sister State are controlling upon a contract made there, but sued upon in the courts of this State, our courts will not take judicial notice of such decisions, but require them to be proved as other facts in the case should be established; and when so established their interpretation is a matter of law, to be decided or declared by our courts. *Keesler v. Ins. Co.*, 394.

18. *Contracts—Insurance—Lex Loci Contractus—Courts—Decisions—Laws of Other States—Georgia.*—It is *held* in this case that, under the decisions of the Supreme Court of Georgia, the delivery of a life insurance policy by the agent of the company to the insured, while the latter was upon his bed with a sickness from which he afterwards died, did not bind the insured upon the policy contract contrary to a provision therein, and in the application for the policy, that it would be invalid under the circumstances, and under a provision of the policy that the act of the agent could not therein vary the terms of the contract, there being no element or suggestion of fraud in the transaction. *Ibid.*

19. *Contracts—Words Employed—Effect—Interpretation.*—The effect of a written contract, as gathered from its terms, will control whatever the parties thereto have therein otherwise called it. *Concrete Co. v. Traction Co.*, 408.

20. *Same—Railroads—Transfer of Contract—Substitution of Contractors—Waiver—Parties.*—A contract for the building of a bridge for a railroad company provided that the contractor shall not sublet or transfer it or any part thereof without the written consent of the civil engineer, and that any extension of time given by the railroad company beyond that specified would not relieve the contractor for damages caused by his failure to have then completed it. The contractor, with the knowledge of the railroad, and as gathered from the written terms, transferred his contract and all rights thereunder to the plaintiff, who was independently and diligently prosecuting the work when

CONTRACTS—*Continued.*

stopped by the railroad company, the defendant, and the plaintiff now sues to recover the consequent damages for the defendant's breach: *Held*, the written consent of the engineer was waived by the defendant under the circumstances, and though the parties to the transfer used the terms "subcontractor" and "sublet" therein, it was in legal effect a substitution of the plaintiff for the original contractor and makes the plaintiff the real party in interest. *Ibid.*

21. *Contracts—Loans—Mortgages—Breach—Specific Performance—Damages—Equity.*—An action for specific performance will not lie where the defendant has refused to lend money to a devisee upon his interest in the land, solely on the erroneous contention that plaintiff did not have the title thereto, the remedy being an action to recover damages for the breach of the contract. *Norwood v. Crowder*, 469.

CONTRACTS TO CONVEY. See Executors and Administrators, 2.

CONTRADICTION. See Evidence, 7, 16.

CONTRIBUTORY NEGLIGENCE. See Corporations, 6; Verdict, 2; Appeal and Error, 22; Pleadings, 8.

CONVICTS. See Homicide, 6, 7, 9.

Convicts—Escape—Officers—Rearrest—Public Duty—Right Barred.—It is the duty of the lawful officer to rearrest an escaped prisoner as a requirement for the public interest, whether the escape was through negligence on his own part or voluntary, which right and duty cannot be barred or impaired by reason of the wrongful absence of the prisoner at the time, by his connivance or with his permission. *S. v. Finch*, 599.

COPIES. See Wills, 5.

COPYING. See Costs, 3.

CORPORATIONS. See Receivers, 1, 2, 3, 4, 5; Evidence, 11; Slander, 1, 4; Pleadings, 1; Compromise, 2; Principal and Agent, 2.

1. *Corporations—Goodwill—Assets—Consideration—Receivers.*—Where a mercantile corporation has sold its stock of goods, together with its goodwill as a going concern, and before the payment of the purchase price a receiver has been appointed, who takes possession thereof, destroys the goodwill, and sues the purchaser for the agreed purchase price, after making tender of the merchandise, the goodwill is regarded as a material inducement and consideration for the contract of sale, and upon a failure of performance in this respect the purchaser may refuse the tender and performance on his part. *Little v. Fleishman*, 22.

2. *Corporations—Goodwill — Value — Receivers — Equity.*—Where the receiver of a corporation has taken possession of its merchandise for its creditors and destroyed its goodwill as a going concern, he may not in behalf of the creditors enforce a contract of sale of the property and goodwill of the corporation made before his appointment, and taking advantage of the wrong done the purchaser, asserting that the goodwill was valueless. *Ibid.*

3. *Corporations—Goodwill—Value—Evidence—Receivers.*—Where a corporation has sold its merchandise and business as a going concern, and

CORPORATIONS—*Continued.*

thereafter a receiver is appointed, who wrongfully takes possession and sells the goods at a much less sum, it is evidence of loss of value caused by the destruction of the goodwill of the concern. *Ibid.*

4. *Corporations—Directors—Trusts and Trustees—Negligence.*—The directors and managing officers of a corporation are trustees, or *quasi* trustees, in respect to their corporate management, and while they are not responsible, as a rule, for a loss arising from mere errors of judgment or from slight omissions, they may, in proper instances, be held liable for loss or depletion of the company's assets due to their willful or negligent failure to perform their official duties or the failure to exercise the care and attention that a prudent man should exercise in like circumstances and charged with like duties or in the conduct of his own affairs of a similar kind. *Besselieu v. Brown*, 65.

5. *Same—Receivers—Actions.*—Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver. *Ibid.*

6. *Corporations—Receivers— Directors— Negligence— Shareholders— Contributory Negligence—Pleadings—Demurrer.*—Where a receiver has been appointed for a corporation, there is a presumption that it is insolvent, having unpaid creditors whose rights are to be considered; and where, in the receiver's action against the directors to recover damages for the defendants' neglect of duty, the complaint alleges a good cause of action the contributory negligence of the stockholders in neglecting their rights for a period of time will not bar a recovery, and a demurrer is bad. *Ibid.*

7. *Corporations— Directors— Negligence— Compromise— Estoppel— Damages.*—Where the directors of a corporation negligently entrusted the management of the corporate affairs to its secretary, who misappropriates the company's funds, and the directors thereafter secure the repayment of the same by mortgage, which it subsequently compromises and pays the money thus received to the corporation, the acceptance of the money does not estop the receiver from maintaining his action for the loss sustained, and this may only be considered in reduction of the damages recoverable. *Ibid.*

CORRECTION. See Appeal and Error, 21.

CORROBORATION. See Appeal and Error, 35.

COSTS. See Wills, 3; Appeal and Error, 20.

1. *Costs — Appeal and Error — Demurrer.*—Where on appeal from a demurrer to a complaint some of the grounds for the demurrer have been sustained and others overruled, the Supreme Court may, in its discretion, direct that the costs of appeal be equally divided between the parties. *Headman v. Comrs.*, 262.

2. *Costs— Transcript— Motions— Judgments— Jurisdiction.*—The costs of preparing and transmitting the record on appeal to the Supreme Court are costs of the Superior Court, and therein motions, orders or

COSTS—*Continued.*

judgments affecting taxing them should be made. *Waldo v. Wilson*, 461.

3. *Same—Copying Transcript—Printing Record—Unnecessary Matter.*—Where it was formerly adjudged in the Supreme Court that the appellant had put into the printed record immaterial and irrelevant matter, which was not set up at the appellee's instance, and not taxable against the latter in taxing the costs of the appeal against him, and there is a later appeal from an order of the Superior Court taxing the defendant for the copying of such immaterial and irrelevant matter appearing in the transcript of the case sent up: *Held*, Rule 22 of the Supreme Court applies to the copying as well as printing the unnecessary matter, and the order appealed from will be reversed. *Ibid.*

4. *Same—Appeal and Error—Prosecution Bond—Duty of Courts—Statutes—Rules of Court.*—The taxing of costs of an action is a creature of statute in contemplation of which each party pays his own costs as the cause proceeds, the prosecution bond being for the security of such costs as the defendant may have wrongfully been compelled to pay, and it is the duty of the court to prevent imposition therein. Therefore an appeal will lie from an order taxing costs of an action made by the Superior Court judge. Supreme Court Rules 19, 21, 22, 31. *Ibid.*

COTTON GINNERS. See Constitutional Law, 10.

COTTON WAREHOUSES. See Parties, 12.

COUNSEL. See Trials, 2.

COUNTERCLAIM. See Usury, 1, 4; Appeal and Error, 3, 14; Compromise, 1; Taxation, 9.

COUNTY. See Judgments, 2; Elections, 2; Homicide, 7; Taxation, 8; Statutes, 2, 4; Constitutional Law, 16.

COURTS. See Costs, 4; Receivers, 2; Appeal and Error, 26, 32, 39, 42, 45; Municipal Corporations, 5; Constitutional Law, 4, 11; Justices' Courts, 1, 2, 4, 5; Cities and Towns, 1; Evidence, 17; Pleadings, 12; Common Law, 1; Usury, 4; Contracts, 17, 18; Schools, 1; Intoxicating Liquors, 9.

1. *Courts—Instructions—Weight of Evidence.*—Objection that a verdict is contrary to the weight of the evidence is directed to the legal discretion of the trial judge, whose action thereon will not be disturbed on appeal. *Mfg. Co. v. Bldg. Co.*, 103.

2. *Courts—Equity—Clerks of Court—Jurisdiction—Executors and Administrators—Sales—Assets.*—While a statutory method by proceedings before the court is provided for the assertion by the widow of her right of dower in the lands of her deceased husband, the jurisdiction of the court of equity has not been disturbed, though usually some equitable element, such as the necessity for an accounting, must be alleged in the suit. *In re Gorham*, 272.

3. *Courts—Stare Decisis—Opinions—Decisions—Vested Rights—Statutes—Common Law.*—While the doctrine of *stare decisis* or the adherence to judicial precedents is fully established, and will continue to be upheld in proper instances by our courts, and a single decision may

COURTS—*Continued.*

become a precedent sufficiently authoritative to protect rights acquired during its continuance, its occurrence is more frequently in relation to the construction of statutes formally made by courts of last resort, thereafter considered as a part of the statute itself; and for this effect to be given to decisions declaratory of the common law or of general equitable principles, it is more usually required that there be a series of like decisions on a given subject, or, if one, that it is so definite in its terms and so generally acquiesced in and acted on that it has come to be recognized as an accepted rule on a given question. *Williamson v. Rabon*, 303.

4. *Same—Rule of Property—Deeds and Conveyances—Mortgages—Public Policy.*—The erroneous principle announced in *Fuller v. Jenkins*, 130 N. C., 130, that a deed absolute in form may be changed into a mortgage by reason of a contemporaneous parol agreement to that effect, without allegation or proof in the suit brought for that purpose, that the clause of redemption was omitted by mistake or fraud, etc., affords no basis for the application of the principle of *stare decisis* or recognition of a fixed rule of law under which rights may be acquired, it being soon overruled and standing alone, and in direct antagonism to the laws of this State as established by a current of decisions from the early times of the Court, and contrary to the rule of our system of jurisprudence maintaining the stability of titles and the security of investments and sound public policy which forms the basis of the doctrine relied upon. *Ibid.*

5. *Courts—Term—Continuance from Day to Day—Order of Judge—Sheriffs—Validity of Trials.*—A judge of the Superior Court whose term of office commences 1 January acts both *de facto* and *de jure* at a term of court commencing by statute on 30 December previous thereto and continuing several weeks, when the sheriff, under his direction, has continued the court from day to day, not exceeding four days, and he qualifies, appears and commences to hold the term within that time, and the validity of a trial objected to on that ground will be sustained. *S. v. Simmerson*, 545.

6. *Court's Discretion—Rape—Jurors—Special Venire—Writs—Entries—Orders—Nunc Pro Tunc—Appeal and Error.*—Where the trial of a capital felony has been proceeded with, and the accused has not exhausted his peremptory challenges, it is within the discretion of the trial judge, not reviewable on appeal, in the absence of gross abuse or corruption in drawing and summoning the jurors, to correct an omission by the clerk to issue the writ for the special venire and to enter the order for it upon the minutes of the court by directing the omitted acts to be done by the clerk *nunc pro tunc* and the sheriff to make the proper return upon the writ. *S. v. Lewis*, 555.

7. *Courts—Superior Courts—Adjournments—Order of Judge—Sheriffs—Statutes—Validity of Trials—Murder.*—Where the term of office of a Superior Court judge expires two days after the commencement of a term of court which his predecessor would otherwise have held, it is proper for the retiring judge not to appear, and for his successor to notify the sheriff of the county to adjourn the court from day to day for four days until he could qualify, though the sheriff may himself thus exercise the authority given him by statute; and objection to the

COURTS—*Continued.*

validity of a trial for murder on that ground is untenable. *S. v. Wood*, 175 N. C., 809; *S. v. Hardin, infra.*, and *S. v. Simmerson, infra.*, cited and approved. *S. v. Davis*, 573.

8. *Courts—Terms—Adjournments—Retiring Judge—Sheriffs—Statutes.*—Where a newly elected judge, as successor to one who was to have held the term of a court commencing on 30 December, continuing for several weeks, and designated by the statute as a Spring Term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days (which right the sheriff himself has under the statute, Rev., 1510), to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer *de jure*. And if not, they are valid as those of an officer *de facto*, and an exception to the validity of a trial of an action on that ground is untenable. *S. v. Harden*, 580.

COURT'S DISCRETION. See Courts; Judgments, 2; Appeal and Error, 20, 50; Estates, 10; Issues, 1; Pleadings, 14.

COURT'S OPINION. See Instructions, 1, 2.

COVENANTS. See Deeds and Conveyances, 4, 5, 7; Fraud, 3.

CREDITOR'S BILL. See Fraudulent Conveyances, 4.

CREDITS. See New Trials, 1; Appeal and Error, 48.

CRIMINAL INTENT. See Homicide, 2.

CRIMINAL LAW. See Intoxicating Liquors, 1, 2; Indictment, 1, 2; Arrest, 1; Negligence, 10.

1. *Criminal Law — Evidence — Footprints — Comparisons — Burnings.*—Where evidence of the foot tracks of the defendant, tried for burning a barn, are competent, testimony as to the comparison of the tracks found at the place at the time of the occurrence with others testified by a witness to be the footprints of the accused that he had seen her make is also competent. *S. v. Fain*, 120.

2. *Criminal Law—Evidence—Burnings.*—With other evidence tending to show the guilt of the accused of burning a barn, testimony that a bottle with the odor of kerosene was found at the premises with a piece of paper rolled as a stopper, which exactly fitted a torn page in the defendant's possession, is competent. *Ibid.*

3. *Criminal Law—Instructions—Reasonable Doubt—Appeal and Error—Harmless Error.*—A part of a charge in a criminal action will not be considered as reversible error for the failure of the judge to charge that the burden of proof was on the State to show guilt beyond a reasonable doubt, when he has so charged, clearly and distinctly, in immediate connection therewith and repeated this instruction in other appropriate parts of the charge. *Ibid.*

4. *Criminal Law—Instructions—Witnesses—Character.*—Where in a criminal action evidence as to the character of the witnesses on both sides have been introduced, an instruction by the trial judge, impartial to them all, that the jury should take into consideration the characters which they have "tried" to prove, etc., will not be held for error, the

CRIMINAL LAW—*Continued.*

expression "tried," etc., taken with the text, being the equivalent of "evidence offered to prove," etc. *Ibid.*

5. *Criminal Law—Assault—Deadly Weapon—Obstructing Justice—Assisting Arrest—Sheriffs—Constables.*—An authorized officer of the law in arresting an offender may use such force, the degree of which is largely within his own judgment, as is necessary to accomplish his purpose; and when withstood, and his authority and purpose made known, he may use the force necessary to overcome resistance, to the extent of taking human life if that be required for the proper and efficient performance of his duty, without criminal liability, unless the force has been excessively and maliciously used or to such degree as amounts to a wanton abuse of authority; and this applies whether the offense charged be a felony or misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority and not dependent on the grade of the offense. *S. v. Dunning*, 559.

6. *Same—Evidence.*—Where an authorized officer of the law is indicted for an assault with a deadly weapon, a pistol, in arresting the prosecuting witness, and there is evidence tending to show that the prosecutor was a dangerous man, terrorizing the town, and the officer made an endeavor to arrest him and was acting under a proper warrant, which he previously made known to the prosecutor, but the latter came forward, threatening to cut him with an open knife and using abusive language, whereupon the officer shot him, though a way for retreat was open for him: *Held*, the evidence, if accepted by the jury as true, is sufficient for an acquittal, the rule as between individuals not applying to an officer acting under a warrant commanding him to make the arrest. *Ibid.*

7. *Criminal Law—Evidence—Collective Facts—Incriminating Conduct.*—Testimony of a witness upon whom the defendants were being tried for assault and battery, that they did not know each other at the time, and that the defendants entered a store soon after the occurrence, when he was calling a policeman by phone and "seemed surprised to see him there," is competent as one of a variety of facts presented to the senses at one and the same time (*S. v. Spencer*, 176 N. C., 712) and was a relevant circumstance for the jury to consider as tending to show their guilt by their action and conduct. *S. v. Harden*, 580.

CUSTODIA LEGIS. See Attachment, 2.

DAMAGES. See Corporations, 7; Negligence, 2, 5, 7; Pleadings, 1; Instructions, 1; Fires, 1, 2; Elections, 2; Fraud, 3; Actions, 2; Parties, 1; Carriers of Goods, 1; Register of Deeds, 1, 3; Municipal Corporations, 1, 2; Constitutional Law, 1; Condemnation, 1, 2, 3; Telegraphs, 1; Vendor and Purchaser, 2; Contracts, 4, 10, 11, 21; Appeal and Error, 3, 44.

DEADLY WEAPON. See Criminal Law, 5; Homicide, 3

DEATH. See Homicide, 1.

DEBTOR AND CREDITOR. See Contracts, 13; Fraudulent Conveyances, 1.

Debtor and Creditor—Gratuitous Services—Peonage.—The creditor of a husband who has gratuitously acted as the agent of his wife in cultivating crops upon her land may not maintain his action to recover

DEBTOR AND CREDITOR—*Continued.*

the value of the services thus rendered by him and subject it to the payment of his debt. The matter of "peonage" discussed by CLARK, C. J. *Guano Co. v. Colwell*, 219.

DEBT. See Wills, 7; Trusts, 1; Fraudulent Conveyances, 4; Removal of Causes, 3.

DECEASED PERSONS. See Evidence, 5, 8, 9, 11.

DECEIT. See Pleadings, 6.

DECISIONS. See Courts, 3; Contracts, 17, 18; Attachment, 4; Estates, 10; Supreme Court, 1; Deeds and Conveyances, 14.

DECLARATIONS. See Principal and Agent, 1; Evidence, 2, 8, 18; Murder, 2.

DEDICATION. See Municiipal Corporations, 1.

DEEDS AND CONVEYANCES. See Pleadings, 3, 5; Contracts, 4, 12; Taxation, 6, 8; Executors and Administrators, 1, 2; Constitutional Law, 1, 2; Wills, 5, 9; Evidence, 3; Courts, 4; Fraud, 1, 2; Actions, 1; Limitation of Actions, 3, 4; Negligence, 2; Husband and Wife, 6, 9; Appeal and Error, 47; Fraudulent Conveyances, 4; Register of Deeds, 1, 3.

1. *Deeds and Conveyances—Personal Property—Title—Equity—Mortgage.* A paper-writing purporting to convey the absolute title to personal property, but, by its express terms, was given as security for a debt, upon condition that the title would vest in the creditor upon the payment thereof, will be regarded in equity as a mortgage, with the right of redemption at any time before foreclosure. *Noland v. Osborne*, 14.

2. *Deeds and Conveyances—Tenants in Common—Limitation of Actions—Judicial Sales—Adverse Possession—Color of Title.*—The construction placed upon the deed of a tenant in common who attempts to convey the entirety, that his grantor takes only the interest of the grantor in the lands, and that the conveyance is not color of title to the whole tract, has not application to a deed executed under judicial proceedings which purports to sell and convey the entirety, and where some of the tenants in common had been made parties to the proceedings under which the court ordered the sale; and sufficient adverse possession thereunder for seven years or more will ripen the title in the grantee. *Alexander v. Cedar Works*, 137.

3. *Same—Rules of Property.*—The rule in this State that a deed to lands held in common, made under a judicial sale, wherein some of the tenants in common have been made parties, will constitute color of title to the entire tract, is one of property concerning which our courts will not follow the contrary doctrine elsewhere prevailing. *Ibid.*

4. *Deeds and Conveyances—Fraud—Mortgages—Equity—Title—Purchase—Covenants — Warranty — Seisin — Possession.*—In an action for a breach of covenant of quiet enjoyment of the lands conveyed by deed, the plaintiff must show an eviction by the owner of a paramount title, the measure of damages being the amount of the purchase money paid for the land, with interest; but in an action upon a covenant of seisin it is only required that the plaintiff show that the defendant had no title or right to convey, the general rule as to the measure of damages being the same in both actions, with the exception that where

DEEDS AND CONVEYANCES—*Continued.*

there is a failure of title to only a part of the land conveyed the plaintiff can recover a proportionate part of the purchase money, and where the plaintiff has necessarily advanced money to remove an encumbrance the measure of damages is limited to the amount actually and reasonably paid, not exceeding the purchase money and interest. *Pridgen v. Long*, 190.

5. *Deeds and Conveyances—Covenants—Seisin—Breach.*—A covenant of seisin in a deed to lands implies that the covenantor then had not only the possession, but the right to possession; in this State a covenant of title, not merely of possession, being synonymous with the covenant of the right to convey, and it is broken by the grantor, not owning the title, at the time he made the deed. *Ibid.*

6. *Deeds and Conveyances—Fraud—Title—Misrepresentations—Investigation—Accord and Satisfaction—Pleadings—Instructions.—Held*, upon the facts appearing in this action to recover damages for the alleged fraudulent representation of the grantor as to his title to the lands conveyed by deed with covenants of warranty and of seisin to the effect that he owned the fee-simple title, the questions of whether the grantee relied upon the grantor's misrepresentations of title or was concluded by an independent investigation thereof in the books in the register of deeds office, or whether a settlement in accord and satisfaction had been made between the parties will be raised in the further development of the case at the trial, when properly pleaded, by requests for special instructions upon issues presenting them. *Ibid.*

7. *Deeds and Conveyances—Fraud—Caveat Emptor—Title—Covenants—Warranty.*—The maxim of *caveat emptor*, in the absence of fraud, applies to contracts of purchase both as to real property and personal property at law and in equity, the contract as to land becoming executed when the conveyance has been duly delivered, and then the purchaser's only rights of relief for defects or encumbrances depends solely upon the covenants contained in his deed. *Ibid.*

8. *Same—Presumptions—Honest Dealings—Rule of the Prudent Man.*—Applying the doctrine of *cavcat emptor* where the grantee has fraudulently conveyed an unencumbered fee-simple title to lands that he did not have, it is only required of the grantee that he should have used the reasonable care and diligence of an ordinarily prudent man in conducting the transaction, it being presumed that men will act honestly in their business dealings, and he is not required to suspect that his grantor is acting otherwise. *Ibid.*

9. *Deeds and Conveyances—Registration—Statutes—Possession.*—A deed to lands registered under the Connor Act, Revisal, sec. 980, conveys title as against an unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession, the provision of the said act as to such possession being restricted to deeds executed prior to 1 December, 1885. *Lanier v. Lumber Co.*, 201.

10. *Same—Fraud—Notice.*—Where there is fraud in the treaty or consideration for a deed to lands, which is afterwards conveyed, the grantee, a purchaser for value in the subsequently executed but prior registered deed, acquires the title to the lands, though with actual notice of the deed the former deed being good until set aside. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

11. *Same—Purchaser for Value.*—The purchaser of land by deed registered prior to a prior executed conveyance of lands, without notice of fraud in the consideration or treaty of the former deed, when nothing appears upon the face of the conveyance to put him upon notice of the fraud, and there is no allegation of any notice there, may convey title to another by deed, and the title is good under this last conveyance though the grantee therein may have had actual notice of the fraud. *Ibid.*

12. *Deeds and Conveyances — Mortgages — Trusts and Trustees — Parol Trusts—Evidence—Allegations—Fraud—Mistake—Redemption Clause.* For the courts to declare a deed to lands, absolute in terms, and conveying the fee-simple title, a mortgage of the grantor therein for the security of a debt or obligation, it is necessary that there be allegation and proof that the clause of redemption was omitted therefrom by reason of ignorance, mistake, fraud, or undue advantage, and parol evidence is incompetent to establish a parol trust in the grantor's favor. *Newton v. Clark*, 174 N. C., 393, cited and applied. *Williamson v. Rabon*, 302.

13. *Deeds and Conveyances—Contracts—Consideration—Agreement to Buy —Flumes.*—A deed to the right to construct and maintain a flume over the grantor's land is upon a sufficient consideration when made for one dollar and the purchase by the grantee of all wood pulp and acid wood, at three dollars per cord, the grantor would deliver, during its operation, within fifteen feet of the flume. *Dorsey v. Kirkland*, 520.

14. *Deeds and Conveyances—Registration—Indexing—Decisions—Prospective Effect—Title.*—The decisions of *Ely v. Norman*, 175 N. C., 298; *Fowle & Son v. Ham*, 176 N. C., 12, holding in effect that indexing and cross-indexing conveyances of land by the register of deeds of a county were essential to a valid registration, are prospective in effect, and not applicable to titles to lands acquired under the construction to the contrary in *Davis v. Whitaker*, 114 N. C., 279. *Bryant Mfg. Co. v. Hester*, 609.

15. *Deeds and Conveyances—Registration—Notice.*—The principle as to notice by a valid registration of a prior executed conveyance of land not being supplied by notice of another character however full and formal, does not apply when the title is not directly involved, but damages of a pecuniary nature are sought against the register of deeds alleged to have been indirectly caused by his failure to fully index and cross-index a prior registered conveyance affecting a contract to manufacture timber growing upon the lands therein conveyed. *Ibid.*

DEFAULT. See Judgments, 6; Register of Deeds, 1, 3.

DEFECTS. See Instructions, 3, 11; Negligence, 4.

DEMAND. See Taxation, 1.

DEMURRER. See Corporations, 6; Pleadings, 1, 2, 4, 10, 11, 13; Motions, 1; Appeal and Error, 29; Costs, 1.

DEPARTMENT OF AGRICULTURE. See Actions, 3; Statutes, 2.

DESCENT AND DISTRIBUTION. See Evidence, 2.

DEVISAVIT VEL NON. See Wills, 16.

DEVISE. See Wills, 1, 8, 15; Easements, 1.

DIRECTORS. See Corporations, 4, 6, 7; Pleadings, 1.

DISCOVERY.

Discovery—Examination Before Trial—Aid in Pleading.—The plaintiff in an action for injuries by alleged neglect of a physician may, under Revisal 1905, sec. 866, providing that an examination of a defendant may be had at any time before the trial, have an examination of defendant to aid him in filing his complaint, where he alleges that he knows the facts generally and substantially, but that defendant has the precise knowledge necessary for proper proceedings. *Smith v. Wooding*, 546.

DISCRETION. See Appeal and Error, 37; Courts.

DISCRETIONARY POWERS. See Municipal Corporations, 5; Cities and Towns, 1.

DISMISSAL. See Appeal and Error, 25, 28; Justices' Courts, 4, 5.

DISOBEDIENCE. See Contempt, 1.

DISTRIBUTION. See Wills, 14.

DOMICILE.

1. *Domicile—Executors and Administrators—Intent—Change of Residence—Clerks of Court—Statutes—Burden of Proof.*—In order to effect a change of "domicile," as distinguished from "residence" or "inhabitancy," within the intent and meaning of our statute giving jurisdiction to the clerk of the court in issuing letters testamentary or of administration, Rev., sec. 16 (3), the intent of the deceased, though he may have left his domicile for the purpose of making the change, and the physical change of residence by him, are both necessary, the one without the other being insufficient, the law being that, though he may have formed the intention to change his domicile, if there is no actual change of residence his domicile remains at his former home, the burden of proof being on the person applying to the clerk for letters to show the jurisdictional fact; but where both the elements are shown, the length of residence in the new place prior to the death of the deceased is not material. *Reynolds v. Cotton Mills*, 412.

2. *Domicile—Clerks of Court—Executors and Administrators—Judgments—Actions—Collateral Attack.*—The right of the clerk of the Superior Court to issue letters testamentary or of administration is made by our statute, Rev., sec. 16 (2), to depend upon the domicile of the deceased within the county, and being jurisdictional, the validity of letters issued by him may be collaterally attacked, by a proper party in interest or in a direct proceeding, depending upon the state of the record in each particular case and the special question involved. *Ibid.*

3. *Same—Record.*—Where the record in proceedings to obtain letters testamentary or of administration on its face, by presumption of law or a recital of facts, shows the proper domicile, the judgment of the clerk of the court granting them may only be attacked for lack of jurisdiction in direct proceedings, recitals therein that the deceased, late of a certain county, is dead, intestate, being sufficient; but it is otherwise

DOMICILE—*Continued.*

if the lack of jurisdiction so appears, for then the judgment may be attacked collaterally. *Ibid.*

4. *Domicile—Clerks of Court—Executors and Administrators—Judgments—Parties in Interest—Actions.*—Where one claiming to be administrator brings an action, as such, to recover damages for the negligent killing of his intestate, the defendant is a party in interest, who may attack the validity of the proceedings wherein the administrator was appointed, upon the ground that the domicile of the intestate was not in that county, and that the clerk therefore lacked jurisdiction in the matter, Rev., sec. 16 (3), and this may be done in a direct proceeding, as was done in this case, or collaterally, as may be proper, in the particular case. *Ibid.*

5. *Domicile—Clerks of Court—Executors and Administrators—Subsequent Appointment — Admissions.*—Where letters of administration have been granted in one county and thereafter the administrator takes out letters in another and the proper county for the purposes of the suit, to which he has been made a party at his request, his having done so has somewhat the appearance of an admission that the prior letters were void, but this is not conclusive upon him. This is said *arguendo.* *Ibid.*

DOWER. See Evidence, 9; Parties, 2; Ejectment, 1; Actions, 6.

1. *Dower—Widows—Rents—Sales—Interest.*—The widow's claim of dower in the lands of her deceased husband, while paramount to that of the heir, is not an estate but a right until allotment, continuing from the death of her husband; and from that time she is entitled to damages, measured by the rental value, for the time she has been kept out of possession; and in case of sale of the lands to make assets to pay the debts of the deceased, interest on her proportionate part from the sale until payment, charging her interest, in return, for such sums as she may be indebted to the estate. The common-law principles relating to this subject and the statutory changes discussed by Mr. Justice Allen. *In re Gorham*, 271.

2. *Same — Heir in Possession — Election of Widow.*—Upon the principles allowing the widow the rents from the lands of her deceased husband by way of damages for being kept out of her dower interest therein, the heir is chargeable only with the rents received while dealing with the property in good faith, or for the reasonable value of the premises if occupied by himself; and this principle obtains as to the proceeds of the sale of her dower lands when bought by her, except, at her election, she may take one-third of the rents collected after the sale in lieu of interest for the period covered by the rents, and she will be chargeable with interest on the purchase price. *Ibid.*

DRAINAGE DISTRICTS. See Actions, 3, 4; Statutes, 2.

DRAINAGE SYSTEM. See Easements, 1, 3.

DYNAMITE. See Negligence.

EASEMENTS.

1. *Easements—Drainage Systems—Implied Rights—Lands—Wills—Devise.* Where lands are severed and held by devise, and during the testator's life he has constructed thereon a drainage system for the entire tract

EASEMENTS—*Continued.*

of a permanent nature, the right to the use of the system will pass by implication to the separate owners of the lands as apparent easements, though they may not originally have had any legal existence as such, as well as those necessary easements without which the enjoyment of the several portions could not be fully had. *Lamb v. Lamb*, 150.

2. *Same— Dominant Owner— Liability — Maintenance — Repairs — Negligence.*—Where a drainage system of an entire tract of land has passed as a right of easement to the devisees of the original owner, who holds the same in separate tracts, the dominant owner of the lands is only liable for maintenance and repairs to the extent that they are necessary and beneficial to his own estate; and while in the exercise of his right of enjoyment of his own part of the system he may enter upon the lands of the servient owner for the purpose of maintenance and repairs, with liability also for damages caused thereto by his willful or negligent breach of duty, the servient owner, who is also making use of the system, may not require the owner of the dominant estate to keep the drainage system on the servient owner's land in proper condition, at his own expense, for the latter's benefit. *Ibid.*

3. *Easements—Drainage Systems—Dominant and Servient Tenant—Maintenance and Repairs — Liability.*—Where separate owners of lands have derived them subject to a drainage system placed upon the entire tract by the original owner, the general rule is, in the absence of statutory or contract provision controlling the matter, that each one using the system must bear the costs of maintenance and repair required by the portion of the system on his own premises, unless this adjustment would work such gross inequality of burden in the particular case as to require a different and more equitable one. *Ibid.*

EFFECT. See Contracts, 19.

EJECTION. See Parties, 1; Actions, 6.

Ejection— Dower— Lessor and Lessee— Parties— Judgment— Estoppel— Statutes.—The lessee of lands for a term, during the continuance of the lease after the death of the deceased owner, is a proper and necessary party to proceedings to lay off the widow's dower wherein the *locus in quo* had been included (Revisal, sec. 3088), and where he has not been made a party in these proceedings he is not bound by the judgment therein in his action of ejectment and to recover damages against the widow, the administrator, and the heirs at law. *Ingram v. Corbit*, 318.

ELECTION. See Wills, 10; Dower, 2.

1. *Election—Inconsistent Remedies.*—The doctrine of election rests upon the choice of the party between two or more inconsistent remedies available to him. *Fleming v. Congleton*, 186.

2. *Same—Counties—Highways— Damages— Statutes— Actions— Estoppel.* Where an owner has withdrawn, without objection, proceedings authorized by a public-local law which he has started before a county board of commissioners for taking his lands for a public highway he may pursue his common-law remedy in the Superior Court upon substantially the same facts and for the same relief, the two remedies

ELECTION—*Continued.*

being consistent with each other, and the proceedings under the statute will not operate as a bar to the common-law action in the court. *Ibid.*

EMPLOYER AND EMPLOYEE. See Master and Servant, 1, 2, 3; Indemnity, 1.

ENTIRETIES. See Husband and Wife, 9.

ENTRIES. See Courts, 6.

EQUATION. See Constitutional Law, 8.

EQUITY. See Deeds and Conveyances, 1, 4; Statute of Frauds, 1; Corporations, 3; Executors and Administrators, 1, 2; Fraud, 3; Actions, 2; Taxation, 7; Indemnity, 1; Courts, 2; Contracts, 14, 21; Pleadings, 13; Fraudulent Conveyances, 5.

ERASURES. See Evidence, 5, 6.

ESCAPE. See Homicide, 7, 9; Convicts, 1.

ESTATES. See Judgments, 3; Appeal and Error, 19; Constitutional Law, 6; Wills, 11, 12, 13; Actions, 5; Husband and Wife, 9.

1. *Estates—Remainder—Contingent Interests—Sales—Statutes.*—While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there was "a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine whom the remaindermen are," under the procedure therein laid down. Public Laws 1903, ch. 99; Pell's Revisal, sec. 1590. *Dawson v. Wood*, 158.

2. *Same—Actions—Parties Plaintiff.*—Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. Pell's Revisal, sec. 1590. *Ibid.*

3. *Estates—Remainder—Contingent Interests—Sales—Statutes—Investments—Reinvestments.*—The provision of chapter 548, Laws 1905, requiring that the proceeds of the sale of land, under the statute, where the remaindermen of contingent interests cannot be ascertained in the lifetime of the first taker, shall be reinvested in realty within two years, was removed by chapters 956 and 980, Laws 1907, leaving the matter of reinvestment somewhat in the discretion of the court, with the clear intimation that the reinvestment in realty should be made when an advantageous opportunity should be offered. *Ibid.*

4. *Estates—Remainder—Contingent Interests—Actions—Parties Defendant—Statutes.*—In proceedings under the statute (Pell's Revisal, sec. 1590) to sell lands held in remainder, upon contingencies rendering the remaindermen incapable of present ascertainment, etc., the necessary parties defendant are those of the remaindermen who, on the happening of the contingency, would have an estate in the property at

ESTATES—*Continued.*

the time of action commenced, and those remotely interested to be represented and protected by a guardian *ad litem*, as the statute provides. *Ibid.*

5. *Estates—Remainder—Contingent Interests—Statutes—Purchaser—Contracts—Deeds and Conveyances.*—Where the commissioner appointed by the court has sold lands affected with contingent interests in remainder of such character that those to whom such interests will ultimately vest are not presently ascertainable, and the provisions of Revisal, sec. 1590, have been carefully pursued, the interest of the contingent remaindermen properly safeguarded, and an advantageous sale has been made, the deed of the commissioner to the purchaser conveys a valid title, and he may be compelled to comply with his contract of purchase. *Ibid.*

6. *Estates—Remainder—Contingent Interests—Statutes—Independent Actions.*—As to whether the purchaser of lands affected by remote and presently unascertainable contingent interests in remainder, sold under proceedings in all respects conforming to the provisions of Pell's Revisal, sec. 1590, can, in an independent action by the commissioner therein appointed to enforce the contract of sale, object to the validity of the sale, *Quere? Ibid.*

7. *Estates—Remainder—Contingent—Interests—Sales—Life Tenants.*—Pell's Revisal, sec. 1590, by providing that a sale of lands affected by certain remote contingent interests may be made when the interest of all parties would be practically enhanced, does not require that the interest of the life tenant therein should be made to suffer for the benefit of the contingent remainderman alone, when the income is absorbed by current costs and charges, for the rights and interests of all parties in interest should be considered and determined with a sense of proportion and in reasonable adjustment of the rights of all. *Ibid.*

8. *Estates—Conditional Fee—Statutes—Fee Tail—Absolute Fee—Deeds and Conveyances—Intent.*—In consideration of natural love and affection and of one dollar, and for her "maintenance and preferment," the donor of lands conveyed them to his granddaughter "and to the heirs of her own body; if she never has heirs of her own body, then in that event she never has any" over to certain designated persons and their children, the granddaughter at the time of the conveyance being a child, but since grown up with a child by marriage: *Held*, (1) at common law the gift to the granddaughter was a conditional fee which became absolute upon the happening of the condition, the birth of the child; (2) the conditional fee is converted into an estate tail under the statute De Donis (13 Edw., I), and into a fee-simple absolute title under our statute, Rev., sec. 1578; (3) construing the words "heirs of her own body" to mean the donee's children, there being no child born at the execution of the deed and no intermediate estate, and the deed having been executed since 1879 (Rev., sec. 946), without words of inheritance, the conveyance would be to the granddaughter in fee upon the birth of the child by the marriage; (3) the intent of the donor, appearing by the proper construction of the deed, would be to give the fee-simple estate to the grandchild upon the birth of her child by marriage. *Sharpe v. Brown*, 294.

ESTATES—*Continued.*

9. *Estates — Contingent Limitations — Death Without Issue — Statutes— Wills—Deeds and Conveyances—Title.*—A devise of lands for life, then to J. and C. equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J. and C. equally: *Held*, the common-law doctrine that a limitation contingent upon death and an indefinite failure of issue is void for remoteness, gives place to the new rule of constriction enacted by our statute, Rev., sec. 1581, made applicable since 15 January, 1828, without restriction as to immediate estates, and a contrary intent, not expressly and plainly declared in the face of the instrument, presently construed, the death without issue refers to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survives, with issue, the absolute fee-simple title to the lands is in C. and the other ulterior remaindermen, and their deed, otherwise sufficient, is valid. *Patterson v. McCormick*, 449.

10. *Same—Stare Decisis—Vested Interests—Erroneous Decisions—Rule of Property—Courts.*—A vested interest in lands cannot be established under the doctrine of *stare decisis* in direct conflict with the expressions of a statutory change of the rule to the contrary, nor where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves, are upon prior executed instruments excepted by the statute, or without express reference thereto; and our statute, Rev., sec. 1581, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected under the rule laid down in *Hilliard v. Kearney*, 45 N. C., 321, and subsequent decisions on the subject. *Ibid.*

ESTOPPEL. See Municipal Corporations, 6; Ejection, 1; Corporations, 7; Waiver, 2; Judgments, 3, 5, 9; Election, 2.

EVIDENCE. See Claim and Delivery, 1; Common Law, 1; Master and Servant, 3; Deeds and Conveyances, 12; Carriers of Goods, 1; Banks and Banking, 4; Fraudulent Conveyances, 1; Trusts, 1; Homicide, 3, 5, 9; Attachment, 1, 2; Murder, 1; Physicians and Surgeons, 1; Intoxicating Liquors, 1, 3, 5, 8, 10; Trials, 3; Insurance, Fire, 1, 2; Principal and Agent, 1, 2; Pleadings, 3, 9; Appeal and Error, 5, 9, 12, 13, 22, 23, 24, 31, 35, 36, 41, 43, 45, 46; Waiver, 1; Criminal Law, 1, 2, 6, 7; Railroads, 1; Larceny, 1; Homicide, 1, 2, 3; Insurance, Life, 1; Fires, 1, 2; Condemnation, 1, 2, 3; Contracts, 1, 7, 9, 17; Corporations, 3; Wills, 3, 11, 19; Verdict, 1, 3, 4; Fraud, 2; Negligence, 1, 2, 3, 9, 10; Instructions, 3, 4, 11; Judgments, 8; Taxation, 4; Husband and Wife, 6.

1. *Evidence—Witnesses—Bias.*—Testimony that a witness on the trial of one accused of a criminal offense was also a witness against the defendant in another case is incompetent as tending to discredit the witness or show his bias. *S. v. Fain*, 120.

2. *Evidence—Declarations—Traditions— Pedigree— Relationship— Title— Descent and Distribution—General Reputation—Appeal and Error.*— Where declarations and tradition in a family tend to prove pedigree, on the question of title to lands by descent, they may be received in evidence only when the declarant is dead and the declarations have

EVIDENCE—*Continued.*

been made *ante litem motam* by those connected with the party to whom they relate by blood or marriage and made under such circumstances as to show it to be natural and likely, from their domestic habits, that they were speaking the truth and could not have been mistaken; and the admission of testimony, otherwise, of the general reputation as to such relationship constitutes reversible error. *Ashe v. Pettiford*, 132.

3. *Evidence—Judgment Roll—Deeds and Conveyances—Tenants in Common—Judicial Sales—Color of Title.*—Where a deed to lands held in common, made under a judicial sale, is relied upon as color of title the judgment roll in the proceedings, disclosing of record that the petition had been filed, sale ordered and confirmed, directing the deed to be made, is sufficient evidence thereof, though some of the essentials must be inferred from the actual existence of the others, as shown in the roll and substantiated by the documents themselves and entries on the minutes of the court. *Alexander v. Cedar Works*, 138.

4. *Evidence—Adverse Possession—Notice.*—Evidence that the owners of the paper title to lands permitted the one claiming by adverse possession under "color" to use the lands under claim of ownership for seven years, with both actual and constructive notice thereof, without objection, is competent as some evidence upon the question of such adverse claim. *Ibid.*

5. *Evidence—Wills—Erasures—Deceased Persons—Transactions and Communications—Statutes.*—Upon the trial of a *caveat* to a will, the testimony of the beneficiaries thereunder that certain erasures were in the will when it was opened, after the testator's death, and that they did not make them, is not a communication or transaction with a deceased person prohibited by Revisal, sec. 1631. *In re Will of Eliza J. Saunders*, 156.

6. *Evidence—Wills—Erasures—Burden of Proof—Trials.*—Declarations of the testator that he had stricken out certain parts of his will is competent evidence when testified to by a disinterested witness, and the burden of proof is upon the persons claiming thereunder to show that the testator had not made the erasures. *Ibid.*

7. *Evidence— Contradiction — Negligence — Subsequent Repairs — Appeal and Error.*—Where there is evidence tending to show that the plaintiff, an employee of the defendant, received a personal injury, caused by the failure of the latter to provide a proper guard for a power-driven saw at a bench he was required to work, and on defendant's behalf that it had provided it, it is competent for the plaintiff to contradict the evidence of the defendant with testimony that these guards had been placed there after the injury; and where this testimony was properly confined strictly to the purpose of contradicting the defendant's testimony or of corroborating the plaintiff's, and was not received as evidence of negligence, no error is found therein on appeal. Competency of such evidence discussed and explained by WALKER, J. *Holt v. Mfg. Co.*, 170.

8. *Evidence— Declarations— Deceased Persons— Accusations Unanswered —Admissions.*—Declarations of the deceased owner of a mule that had been killed by defendant, who did not turn out of the road as

EVIDENCE—*Continued.*

required by an existing statute, made to the defendant at the time of the occurrence, that "You have run over my mule and you will have to pay for her," is not a communication or transaction with a deceased person, excluded as evidence on the trial, and when the charge was not answered by the defendant it is competent as an implied admission. *Goodrich v. Matthews*, 198.

9. *Evidence — Deceased Persons — Transactions and Communications — Statutes — Executors and Administrators — Dower — Principal and Agent.*—Where the administrator has brought proceedings to sell the lands of the intestate to pay his debt, subject to widow's dower, and it appears that only a part of the lands was owned by the intestate, and that he had taken title in the other part to facilitate transactions as selling agent for a bank, but to which proceedings the bank was not a party, the officers of the bank have no such direct legal or pecuniary interest in the result of a subsequent action, between the administrator and the widow, as would disqualify them from testifying to the fact of agency, under the provisions of Revisal, sec. 1631, in favor of the administrator and against the widow claiming her right of dower in the whole of the lands; and where their testimony was as to the contents of a written contract of such agency, it was not necessarily of a conversation or transaction between the bank and the deceased. *In re Gorham*, 271.

10. *Evidence—Usury—Verdict—Agreement—Intent.*—Where the evidence is conflicting, in an action upon notes given by a depositor to a bank, on the question as to whether there was an agreement between the plaintiff and defendant that the latter should keep, as a part of the consideration for the loan, an unchecking account of 20 per cent of the amount thereof, which would effect an usurious rate of interest, the verdict of the jury, under correct instructions, that the plaintiff did not knowingly take, receive, reserve or charge a rate greater than the legal rate, will be interpreted that there was no usurious agreement or unlawful intent, and judgment thereon in plaintiff's favor is a proper one. The law relating to usury discussed by WALKER, J. *Bank v. Wysong & Miles Co.*, 284.

11. *Evidence—Deceased Persons—Statutes—Corporations—Officers—Shareholders.*—Our statute (Revisal, 1631), excluding as evidence, on the trial of an action, transactions or communications with deceased persons, etc., applies where the witness is a party to the action or claiming under a party thereto, or where he is testifying in his own behalf or in the behalf of a party succeeding to his title, or against the representative of a deceased person, or one deriving title through such person, or to transactions or communications between the witness and the person since deceased whose representative is a party to the action. Hence, where the action is between two corporations, an officer and shareholder of the plaintiff corporation may testify as to transactions or communications with the president and shareholder of the defendant corporation, since deceased, when otherwise competent. *Ibid.*

12. *Evidence—Res Inter Alios Acta—Competency—Knowledge of Witness.* Testimony of a witness as to matters relevant to the inquiry and within his own knowledge is not objectionable as *res inter alios acta*. *Nance v. Telegraph Co.*, 314.

EVIDENCE—*Continued.*

13. *Evidence— Pleadings— Amendments— Physicians and Surgeons — Malpractice—Appeal and Error—Harmless Error—New Trials.*—Where the trial judge has permitted the defendant to amend his answer during the trial of an action against a physician to recover damages for alleged malpractice, so as to deny an allegation charging negligence and a lack of proper or ordinary skill, and it appears that frequently in the pleadings this allegation has been made and denied, and the amendment permitted was to correct the only instance where the allegation had been admitted, the refusal of the trial judge to permit the plaintiff to introduce the original complaint and answer containing this admission, if erroneous, was harmless, such evidence being so infinitesimal that it could not possibly have changed the verdict in defendant's favor were a new trial awarded thereon. *Brewer v. Ring and Valk*, 476.

14. *Evidence— Physicians and Surgeons— Diagnosis— Opinions— Malpractice.*—In an action against a physician to recover damages for malpractice, medical expert opinion is competent upon the questions as to whether he had properly and sufficiently made the diagnosis of the case in his erroneous treatment of a pregnant woman for tumor, under the evidence in the case, and as to whether the defendant should have detected the pregnancy during the course of his examination made with the proper exercise of the ordinary skill and medical knowledge of an average practitioner, and according to the approved practice and principles of the medical profession. *Ibid.*

15. *Evidence— Railroads— Fires— Trials— Questions for Jury.*—Upon the trial of this action to recover damages of a railroad company for setting fire to plaintiff's timber, there was some evidence tending to show that the fire was caused by sparks from the smokestack of defendant's locomotive by reason of defects therein, and evidence to the contrary: *Held*, the cause was properly submitted to the jury, and that the testimony of a witness in the case as to seeing sparks thrown from this smokestack was sufficiently proximate in point of time to be admitted as additional evidence of the smokestack being defective. *Williams v. Mfg. Co.*, 512.

16. *Evidence—Contradiction—Rape—Trials.*—Where the prisoner and his witnesses have testified, for the purpose of proving an alibi, that he was sick in bed for a period of time extending over two weeks, including the day on which the rape was committed, for which he was being tried, it is competent, in order to contradict these statements, for the State to show that during that time he was several times seen apparently well and going about at other places. *S. v. Lewis*, 555.

17. *Evidence, Exclusion—Courts—Inadvertence—Appeal and Error—Objections and Exceptions.*—Where evidence has been admitted on the trial and afterwards excluded by the trial judge as incompetent, and the jury so instructed, his inadvertently referring to it in his charge without instruction thereon should be called to his attention at the time to afford him an opportunity for correction. *S. v. Harden*, 580.

18. *Evidence—Vendor and Purchaser—Principal and Agent—Declarations.* Where an agent makes a sale, subject to the approval of the vendor, who makes material alterations therein, which the purchaser rejects, the declarations made by this agent in endeavoring to adjust the

EVIDENCE—*Continued.*

matter with the purchaser, under authority of his principal, are competent as evidence in the purchaser's behalf. *Harvell v. Auto Co.*, 29.

EXAMINATION BEFORE TRIAL. See Discovery, 1.

EXCEPTIONS. See Appeal and Error, 5, 35.

EXCHANGE. See Fraudulent Conveyances, 6.

EXCUSABLE NEGLECT. See Appeal and Error, 27.

EXECUTION. See Attachment, 2; Fraudulent Conveyances, 5.

EXECUTORS AND ADMINISTRATORS. See Parties, 1; Pleadings, 3; Evidence, 9; Constitutional Law, 2, 3; Courts, 2; Judgments, 9; Wills, 14; Trusts, 1; Limitation of Actions, 5; Domicile, 1, 2, 4, 5.

1. *Executors and Administrators—Wills—Deeds and Conveyances—Seals—Heirs at Law—Equity.*—A deed to lands made by the executor, though not under seal, in pursuance of a power contained in the will, is enforcible in equity against the heir at law, especially when he is provided for in the will and is benefited by the conveyance. *Vaught v. Williams*, 78.

2. *Executors and Administrators—Wills—Deeds and Conveyances—Seals—Equity—Contracts to Convey.*—A seal is unnecessary to an executor's deed made under a power in the will, to convey the equitable title, as against the heir at law, provided for in the will, and may be regarded as a contract to convey, wherein the seal is unimportant. *Ibid.*

3. *Executors and Administrators—Administration—Letters Testamentary—Statutes—Next of Kin—Renunciation.*—The widow of the deceased testator, with a life estate in her husband's personalty, qualified as his administratrix *c. t. a*, and at her death some of his next of kin in equal degree renounced their right to administer *c. t. a. de bonis non* on his estate in favor of her brother, who was appointed by the clerk of the Superior Court. One of the next of kin of the deceased husband, in equal degree of those who had renounced, within six months after the death of the wife, petitioned for the removal of the administrator *c. t. a. d. b. n.* and applied for letters in his stead, which the clerk refused in the exercise of a discretionary power claimed by him to appoint among next of kin in equal degree: *Held*, the renunciation of some of the next of kin in equal degree with the petitioner, who has not renounced (Rev., sec. 11), could not affect his right, and the statutes on the subject of administration, chapter I, subdivisions 2 and 3 of the Revisal, distinguishes between letters of administration and letters testamentary, and applies section 3 to the facts of this case without reference to the six months limitation in section 12, whereunder the petitioner, applying within six months after the death of the administratrix, is entitled to the relief sought by him. *In re Jones*, 337.

EXEMPTIONS. See Married Women, 1; Partnership, 1.

EXPERTS. See Appeal and Error, 45.

EXPLOSIVES. See Negligence, 9.

EXPRESSION OF OPINION. See Instructions, 3, 5, 7.

FACTS. See Supreme Court, 1.

FALSE REPRESENTATIONS. See Insurance, Life, 1.

FARMING. See Constitutional Law, 10.

FEDERAL COURTS. See Pleadings, 12; Usury, 4.

FEE. See Wills, 1.

FEE TAIL. See Estates, 8.

FINDINGS. See Appeal and Error, 2, 3, 27, 36, 40, 41, 43, 49.

FIREARMS. See Homicide, 4.

FIRES. See Negligence, 2, 3, 4, 6, 7; Instructions, 3, 11; Pleadings, 8; Railroads, 1; Evidence, 15.

1. *Fires — Damages — Evidence.*—Where the defendant is responsible in damages for the destruction of timber growing upon the plaintiff's lands, which it negligently set on fire, testimony of the difference between the value of the land before and after the burning is competent upon the issue as to the amount of damages recoverable in the action. *Bradley v. Camp Mfg. Co.*, 153.

2. *Fires—Damages—Timber—Evidence.*—In this action to recover damages for the negligent setting fire to the timber on plaintiff's lands, there was evidence tending to show that a spark from defendant's engine set fire to defendant's foul right of way and burned the plaintiff's adjoining lands, and it is held sufficient to take the case to the jury, it being incumbent on the defendant to satisfy the jury that its engine, which was in its possession and control, was properly equipped and handled, they being matters peculiarly within its own knowledge, or take the chance of an adverse verdict. *Ibid.*

FOOTPRINTS. See Criminal Law, 1.

FORMER DECISIONS. See Appeal and Error, 9.

FRAGMENTARY APPEAL. See Appeal and Error, 1.

FRAUD. See Contracts, 5; Judgments, 2; Insurance, Life, 1; Deeds and Conveyances, 4, 6, 7, 10, 12; Pleadings, 5, 6; Limitation of Actions, 3; Attachment, 1, 2.

1. *Fraud —Deeds and Conveyances —Intent —Appeal and Error.*—Where damages are sought in an action against the grantor in a deed conveying land, for falsely and fraudulently representing that he had a good and indefeasible title to the same, the question is presented for the consideration of the jury as to whether there was a false assertion of title which was calculated to deceive, made with the intent to do so, and which was relied upon by the grantee, who was thereby misled to accept the title to his injury; and the exclusion by the trial judge of evidence as to the intent of the grantee in making the assertion of title in himself is reversible error. *Pridgen v. Long*, 189.

2. *Fraud—Intent—Evidence—Deeds and Conveyances—Mortgages—Mortgagor and Mortgagee—Title.*—While the transfer of notes secured by

FRAUD—*Continued.*

a deed of trust, together with assignment of the mortgagee's interest, which was endorsed on the mortgage by the mortgagee to the mortgagor, does not, under our decisions, reconvey the title to lands, which continues in the trustee, a representation by the mortgagor, a layman, that he is the owner of the unencumbered fee-simple title, when conveying it to a third person with covenants and warranty of titles, does not of itself or as a matter of law disclose a fraudulent intent, so as to exclude, under competent evidence or the circumstances attending the transfer, the element of fraud from the consideration of the jury under the doctrine that ignorance of the law excuses no one. *Ibid.*

3. *Same—Equity— Purchase— Covenants— Warranty— Measure of Damages.*—Where the action is brought against a grantor of lands by deed containing covenants of seisin and warranty of a fee-simple absolute title to lands to recover damages for falsely and fraudulently representing that he had an unencumbered fee-simple title thereto the action is upon the fraud, and not upon the covenants of the deed, in which latter case a different rule obtains, and an instruction by the court to the jury that the measure of damages is the amount paid by the grantee for an outstanding equity to perfect his title, leaving out of consideration whether the price so paid was a reasonable amount, fairly and honestly paid, is reversible error. *Ibid.*

FRAUDULENT CONVEYANCES.

1. *Fraudulent Conveyances — Gifts — Debtor and Creditor — Statutes— Pleadings—Evidence—Trials—Deeds and Conveyances.*—Upon the issue as to whether a bankrupt had, at the time of making a gift, retained property fully sufficient and available for the satisfaction of his then creditors (Revisal, sec. 962), allegations in his answer and his evidence, in attempting to show that he had done so, to the effect that "he owed little or nothing more than he had property to pay," is insufficient for the judge to reverse a negative finding of the jury and answer the issue in the affirmative, it being for the jury to thereon find as to the debtor's solvency or insolvency at the time of making the gift. *Garland v. Arrowood*, 371.

2. *Same—Intent.*—It is the determination by the jury of the fact of whether the donor had retained property amply sufficient to pay his creditors at the time of his making the gift, within the intent and meaning of the statute, Revisal, sec. 962, which determines the validity of the transaction, and the question of his intent to defraud has no significance. *Ibid.*

3. *Same—Issues.*—As to whether the issue in this case, upon the question of the donor's having retained sufficient property to pay his debts at the time of the gift, was properly drawn in accordance with our statute, Revisal, sec. 962, *quere?* It is undisturbed upon the partial new trial awarded, leaving its proper form to the counsel and the court, under proper instructions. For the rights of existing and subsequent creditors, *Aman v. Walker*, 165 N. C., 224, cited and approved. *Ibid.*

4. *Fraudulent Conveyances— Deeds and Conveyances— Debts— Creditor's Bill.*—A gift of lands cannot be set aside by subsequent creditors of the donor on the ground that he had not retained property amply

FRAUDULENT CONVEYANCES—*Continued.*

sufficient to pay his debts, unless the existence of an unpaid debt is shown at the time of the execution of the conveyance. *Sutton v. Wells*, 524.

5. *Same—Mortgages—Equity—Purchase by Mortgagee—Execution—Purchaser.*—Where a trustee in a deed of trust for the benefit of creditors has settled all claims against the estate, and under the direction of the trustor has conveyed his lands to a third person as security for a debt then incurred, and thereafter a settlement is made upon the payment of certain moneys to the trustor and an exchange of lands, and thereafter the trustor again failed in business and made an assignment: *Held*, the later transaction closed the relation of mortgagor and mortgagee theretofore existing, and therefore there was no existing equity of the donor which his later creditors could subject to the payment of their debts, there being no creditor to satisfy at the time of the execution of the second deed which satisfied the mortgage. *Ibid.*

6. *Same—Exchange of Lands.*—A transaction between a mortgagor and mortgagee, wherein the latter afterwards acquires the equity in consideration of an exchange of lands and money paid, will not be set aside in a creditor's suit, the supervision of equity being to prevent fraud and oppression, where the credits were made after the cessation of the mortgage relation, and it is not shown that any prior creditor was complaining or existed, and the right claimed to follow the funds in the exchange of the lands will be denied. *Ibid.*

FRONT FOOT RULE. See Municipal Corporations, 7.

GARNISHMENT. See Banks and Banking, 2.

GIFTS. See Fraudulent Conveyances, 1; Husband and Wife, 8.

GOODWILL. See Corporations, 1, 2, 3.

GOVERNOR. See Parties, 3.

GOVERNMENTAL FUNCTIONS. See Municipal Corporations, 8.

GRANTS. See State's Lands, 1.

GRATUITOUS SERVICES. See Debtor and Creditor, 1.

GUARANTOR OF PAYMENT. See Principal and Surety, 8; Contracts, 16.

GUARDIAN. See Husband and Wife, 2.

HARMLESS ERROR. See Appeal and Error, 33, 50, 51; Criminal Law, 3.

HEALTH. See Schools, 2.

Health—Municipal Corporations—Cities and Towns—Ordinances—Surface Privies—Assessments—Liens.—An ordinance placing surface closets or privies within the corporate limits of the town under the supervision and inspection of the town authorities, and imposing a charge of thirty cents a month upon the owners of the property for cleaning and inspecting them, making it a lien upon the lands, enforcible in the same manner as State, county and municipal taxes, is valid and enforcible under the provisions of ch. 36, subch. 7, sec. 4, of the Pub-

HEALTH—*Continued.*

lic Laws of 1917, providing that "cities and towns shall have the power summarily to remove or abate, etc., everything in the city limits, or within a mile of said limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and if not paid shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes"; and also comes within the spirit of the preamble to our Constitution that one of its objects is "to promote the general welfare." *Ratchford v. City of Gastonia*, 375.

HEAT. See Carriers of Passengers, 1; Instructions, 6.

HEIRS. See Wills, 11, 13; Dower, 2; Executors and Administrators, 1; Wills, 12; Parties, 1, 2.

HIGHWAYS. See Elections, 2; Negligence, 1; Constitutional Law, 8; Statutes, 5.

HIGHWAY ROBBERY. See Murder, 1.

HIRING OUT. See Intoxicating Liquors, 9.

HOMICIDE. See Negligence, 10.

1. *Homicide—Harmless Drinks—Vendor and Purchaser—Poison—Death—Presumptions—Evidence—Burden of Proof.*—Where there is evidence tending to show that the defendant sold an ordinarily harmless beverage, but drinking of which produced death, and it was afterwards found to contain 38 per cent of a deadly poison, a *prima facie* case is made out against him, whereupon he must show matters of exculpation; and where no felonious purpose to commit murder by poisoning, with malice aforethought, is indicated, it is sufficient to support a verdict of manslaughter. *S. v. Keever*, 114.

2. *Homicide — Intoxicating Liquors — Poison — Vendor and Purchaser—Criminal Intent — Manslaughter — Evidence.*—One who intentionally puts wood alcohol into a harmless beverage to produce intoxication, and sells the same, acts recklessly and in violation of the prohibition law, and though he has done so without knowledge of its poisonous quality, and death thereby results to others by drinking it, he is guilty of manslaughter. *Ibid.*

3. *Homicide— Murder— Deadly Weapon— Malice— Intent— Affray— Evidence—Nonsuit—Trials.*—Evidence that the prisoner had personally threatened the deceased, for whose unlawful killing he was being tried, and had prepared himself therefor with a pistol; that the deceased went out to meet him, upon his return, with the wooden handle of a cant-hook, and having engaged in an affray was fired at three times by the prisoner, one or two of the shots having been fired as the deceased was retreating, is sufficient to infer any previous malicious intent on the part of the prisoner to kill the deceased with the pistol, and to sustain a verdict of murder in the first degree; and there being also evidence sufficient to convict him of murder in the second degree, a motion for judgment as of nonsuit upon the evidence was properly denied. *S. v. Atwood*, 176 N. C., 704; *S. v. Crisp*, 170 N. C., 755; *S. v. Myrick*, 171 N. C., 788, and other like cases, cited, applied and approved. *S. v. Evans*, 564.

HOMICIDE—*Continued.*

4. *Homicide—Manslaughter—Instructions—Firearms—Recklessness—Self-Defense—Instructions.*—Where a third person is killed while endeavoring to prevent a homicide which appeared imminent, and there is evidence that the combat was sudden, but the prisoner willingly entered into it and pointed a gun at his opponent while the latter was assaulting him with his hands, and that the gun fired while the deceased, having caught the gun barrel, was jerking it to prevent the homicide: *Held*, an instruction is proper under Revisal, sec. 3632, and the common law, from the wanton and reckless pointing and use of the gun by the prisoner; that if the prisoner willfully entered into and pursued the combat, resulting in the heat of passion in the death of the deceased, he would be guilty of manslaughter, and that to sustain a plea of self-defense it must be shown that the defendant was without fault in bringing on or provoking the difficulty, or that he had abandoned it after it was started, or that having retreated as far as he could have done with safety he used the force that was apparently necessary under the circumstances. *S. v. Coble*, 588.

5. *Homicide—Self-Defense—Instructions—Evidence.*—An instruction on a trial for a homicide that should the jury find the facts to be as testified they should find the defendant guilty of manslaughter, constitutes reversible error where there is evidence in the prisoner's behalf of a perfect self-defense, for such evidence will be taken as true on appeal and interpreted in the light most favorable to the prisoner. *S. v. Finch*, 599.

6. *Homicide—Self-Defense—Escaped Convict—Rearrest—Resisting Arrest.* While ordinarily one on trial for a homicide may not establish his plea of a perfect self-defense when he has wrongfully provoked a difficulty, involving a breach of the peace, and kills his adversary in the progress of the fight, unless at a time prior to the killing he had quitted the contest and in some way signified his purpose to do so, this doctrine does not apply when the deceased knowingly resisted rearrest by an officer from whose lawful custody he had escaped, who shot and killed the deceased under a reasonable apprehension of death or great bodily harm, and without excessive force, as it appeared to him under the circumstances, the reasonableness of this apprehension and of the force he used being ordinarily questions for the determination of the jury. *Ibid.*

7. *Homicide— Convicts— Escape— Rearrest— Counties— Arrest.*—A township superintendent of convicts and one of his guards, when summoned by him for the purpose, may lawfully rearrest in any county of the State without a new warrant one of the convicts who had escaped from his custody while serving a sentence of court, and hold him until his time had fully expired, not counting the time he was wrongfully out of prison by reason of the escape. Revisal, sec. 5407. *Ibid.*

8. *Same — Common Law — Statutes — Constitutional Law.*—The common-law doctrine that an escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court, is not changed either by our Constitution or statutes (Revisal, secs. 2817 and 937) relating to the confines of the particular county,

HOMICIDE—*Continued.*

having reference to process and writs directed to them; and Revisal, secs. 3176-3182, not specifying or inhibiting the application of the common-law doctrine. *Ibid.*

9. *Homicide—Convicts— Escape— Self-Defense— Evidence— Questions for Jury—Trials.*—Upon the trial of an officer for the killing of an escaped prisoner whom he may have lawfully arrested, there was conflicting evidence as to whether the officer called the convict to the door of the house, and instantly shot him and killed him, upon calling him to put up his hands just after the convict had opened it, or whether, at the time of the killing the convict motioned to draw a pistol under circumstances threatening death or great bodily harm, and whether the convict knew he was being arrested by the proper officer of the law to compel him to fill his unexpired sentence imposed by the court and from which he had escaped: *Held*, it was for the jury to find the facts on the plea of a perfect self-defense and to acquit the prisoner should they find that the deceased knew that the prisoner was making the arrest as a lawful officer, and that the latter, upon being wrongfully threatened with the former's pistol, and knowing his reputation as a dangerous character, and from the other facts and circumstances as they reasonably appeared to him, in the judgment of the jury, acted upon the apprehension that it was necessary for him to kill the deceased to save himself from death or great bodily harm. *Ibid.*

HUSBAND AND WIFE. See Judgments, 1; Pleadings, 7; Constitutional Law, 7; Partnership, 1; Married Women, 1; Trusts, 1.

1. *Husband and Wife—Actions—Joinder—Insanity of Wife—Judgments—Consent—Principal and Agent—Statutes.*—The joinder of the husband in an action maintainable against the wife alone, Rev., 563 (4), though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purposes of the suit; this does not obtain if she is insane, and his consent in such case to the entry of a judgment affecting her lands is voidable, and she may thereafter move to have it set aside. *Craddock v. Brinkley*, 125.

2. *Husband and Wife—Actions—Married Women—Statutes—Guardian—Next Friend.*—It is not required that the wife, as such, prosecute or defend an action concerning her lands by guardian or next friend. Rev., sec. 407. *Ibid.*

3. *Husband and Wife—Principal and Agent—Wife's Separate Lands—Husband as Agent—Presumptions.*—A husband cultivating a farm, the separate estate of his wife, without contract of lease merely acts as the agent of the wife therein, the presumption being that his services were gratuitously given as a contribution to the support of the family, and he has no interest in the crops that his creditors can follow and subject to the payment of his debts. *Guano Co. v. Colwell*, 218.

4. *Same—Liens.*—Where the husband is merely acting as the agent of his wife in cultivating her farms he may not, as such agent, give a valid lien upon the crops upon his wife's land for any purpose. *Ibid.*

5. *Husband and Wife—Principal and Agent—Implied Authority.*—Where the husband and wife are living together, and he is acting as her agent in farming her lands, he has implied authority to incur in-

HUSBAND AND WIFE—*Continued.*

debtedness in her behalf for the fertilizer used thereon in making the crop, with her knowledge and without her dissent. *Thompson v. Coats*, 174 N. C., 193, cited and distinguished. *Ibid.*

6. *Husband and Wife—Deeds and Conveyances—Statutes—Probate Officer—Certificate—Mistake—Evidence.*—Where the wife brings suit to set aside her deed to lands conveyed by her to her husband for failure of the probate officer to certify that it was not unreasonable or injurious to her, Revisal, 2107, and the defendants allege that this requirement was observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time is competent in rebuttal of the defendant's evidence, if he had introduced any, and immaterial if he did not so so. *Anderson v. Anderson*, 401.

7. *Husband and Wife — Wife's Separate Property — Betterments.*—The heirs at law of the deceased husband may not recover for improvements he had placed on his wife's lands with his own money, in the absence of proof that he did so under a written contract properly probated, and with the officer's certificate required by Revisal, sec. 2107, or that he made them with the honest belief that he owned the title or that he reasonably believed that he was improving his own land. *Ibid.*

8. *Husband and Wife—Betterments—Gifts—Presumptions.*—The husband has no lien upon his wife's lands for improvements he has knowingly placed thereon with his own money in the absence of a valid agreement to that effect, the presumption being that it was a gift to her. *Ibid.*

9. *Husband and Wife— Estates— Entireties— Common Law— Husband's Rights—Statutes—Mortgages—Leases—Deeds and Conveyances.*—The common-law doctrine of survivorship between husband and wife, where lands have been devised to them in entireties, has not been changed by statute and applies in the courts of this State, and thereunder the husband has the right of possession and management and to mortgage or lease the same to the extent that he may not impair the wife's title when or in the event she survives him. Therefore a deed by the husband of the right to construct and maintain a flume across the lands for the grantee's purpose of floating logs until a certain plot of timber had been cut by him or removed from lands beyond is valid and enforcible during its continuance without the joinder of the wife, who, with the husband, is still alive. *Dorsey v. Kirkland*, 520.

IMPEACHING EVIDENCE. See Larceny, 1.

IMPROVEMENTS. See Municipal Corporations, 4.

INADVENTENCE. See Appeal and Error, 7.

INDEMNITY. See Principal and Surety, 8.

Indemnity— Contracts— Master and Servant— Employer and Employee— Bonds—Actions—Sequestration—Equity— Loss— Judgments.—An employee has no right of action upon an indemnifying contract taken out by his employer for the latter's sole benefit and to protect him

INDEMNITY—*Continued.*

alone from loss or damages to his employees caused by accidents received by them in the course of their employment; and where the assured employer has become insolvent and has left the State the policy is not subject to the equitable principle of sequestration in the employee's action, unless the plaintiff has obtained a judgment against the assured to the extent of his unpaid claim or has acquired a contractual right against the indemnitor by assignment of the policy or otherwise. *Clark v. Bonsal*, 157 N. C., 270; *Hensley v. Furniture Co.*, 164 N. C., 148, cited, approved and applied. The assured (employer) must actually sustain a loss before an action will lie upon the indemnifying policy, as this is expressly required by its terms. *Newton v. Seeley*, 528.

INDEPENDENT CONTRACTOR. See Contracts, 7.

INDEPENDENT CAUSE. See Negligence, 5.

INDEXING. See Deeds and Conveyances, 14; Register of Deeds, 1, 3.

INDICTMENT.

1. *Indictment—Criminal Law—Judgments—Motions—Arrest of Judgment—Defective Counts.*—A general verdict of a jury convicting of a criminal offense will not be disturbed by motion in arrest of judgment on the ground of defective counts stated in the bill of indictment if others set out therein are good. *S. v. Brady*, 587.

2. *Indictments— Criminal Law— Judgments — Motions — Arrest of Judgment—Evidence—Trials.*—Substantial defects on the face of the indictment is the only ground upon which a motion in arrest of judgment can be sustained, and the court will not look to extrinsic evidence to ascertain the defects. *Ibid.*

3. *Same — Instructions — Prayers for Instruction — Trials.*—A failure of proof to sustain the counts in a bill of indictment should be taken advantage of by a prayer for special instruction, and not by motion in arrest of judgment on the verdict. *Ibid.*

INJUNCTION. See Pleadings, 13.

INSANITY. See Judgments, 1; Husband and Wife, 1.

INSTRUCTIONS. See Usury, 1; Intoxicating Liquors, 2, 3, 7; Courts, 1; Indictment, 3; Appeal and Error, 6, 7, 8, 10, 11, 12, 15, 16, 18, 21, 22, 24, 30, 35, 46, 51, 52, 55, 56; Criminal Law, 3, 4; Trials, 2; Negligence, 8, 9, 10; Register of Deeds, 2; Master and Servant, 1, 3; Verdict, 1; Deeds and Conveyances, 6; Banks and Banking, 4; Homicide, 4, 5.

1. *Instructions— Contentions— Misstatements— Court's Opinion— Contentions—Appeal and Error—Objections and Exceptions.*—An objection to a statement by the trial judge of the allegations and contentions of the parties should be made at the time to afford him an opportunity for correction, or it will not be considered on appeal; nor will the statement be regarded as an intimation by the judge of his own opinion. *Bradley v. Camp Mfg. Co.*, 153.

2. *Instruction—Court's Opinion—Damages—Pleadings—Appeal and Error—Prayers for Instruction.*—The mere restriction of the amount of damages recoverable in an action to the demand therefor, as stated

INSTRUCTIONS—*Continued.*

in the complaint, is not to the defendant's prejudice nor objectionable, as an expression of the opinion of the judge thereon, it being required that defendant offer special prayers if he desired more specific instructions as to the measure of damages. *Ibid.*

3. *Instructions—Expression of Opinion—Evidence—Fires—Negligence—Stationary Engines—Defects.*—Where there is evidence that the plaintiff's lands were set fire to and damaged by the actionable negligence of the defendant in operating a stationary steam engine thereon not properly equipped with a spark arrester, it is error to the plaintiff's prejudice for the trial judge, in reference to plaintiff's contention to the contrary, to state to the jury that he recollected no evidence as to the spark arrester, and his further remark that they could consider any other defects about the machinery, signified that there was no evidence to support the plaintiff's contention as to the spark arrester, and is reversible error. *Royal v. Dodd*, 207.

4. *Instructions—Appeal and Error—Objections and Exceptions—Special Requests.*—Exception that the charge of the trial judge to the jury was not sufficiently full upon a certain aspect of the case should be to his refusal to give a requested instruction bearing thereon, or it will not be considered on appeal. *Kearney v. R. R.*, 252.

5. *Instructions—Expression of Opinion—Statutes—Negligence.*—A charge in a negligence case is not violative of our statute prohibiting the judge from expressing his opinion to the jury on the facts, because he instructs them that defendants may not always be punished for negligence, by reason of the use of the words "as in this case," when he further states, "if there is any injury," saying, in effect, that damages may not always be recovered for a personal injury. *Hipps v. R. R.*, 472.

6. *Same—Carriers of Passengers—Waiting Room—Heat—Stations.*—In an action to recover of the carrier damages alleged to have been caused a passenger by the negligent failure of the defendant to heat its waiting room in cold and inclement weather: *Held*, an expression in the charge, "was the negligent act of the defendant to furnish the heat the direct cause of the plaintiff's injury?" is not the judge's opinion upon the facts, forbidden by statute, when followed by the words, "if you find there was a negligent act"; and there is no merit to an exception to his statement that there was evidence to show the plaintiff suffered, when in fact there was such evidence. *Ibid.*

7. *Instructions—Fragmentary Parts—Negligence—Expression of Opinion.* In the plaintiff's action for damages arising from the defendant's negligent acts, the charge, construed as a whole, properly made the recovery to depend upon the establishment of the negligence alleged, and in this connection the judge said, "Was the failure of defendant's duty the cause of the plaintiff's sickness," etc., which is *held* not an expression of the judge's opinion upon the facts prohibited by our statute. *Ibid.*

8. *Same—Separate Waiting Room—Stations—Statutes—Common Law.*—A charge of the court upon the duty of a common carrier to provide and sufficiently heat in cold and inclement weather its separate waiting rooms for white and colored people, under the provisions of our State, is immaterial and harmless, where the cause of action arose in

INSTRUCTIONS—*Continued.*

another State, and the common law is presumed to be applicable if, in fact, the carrier had provided the separate waiting rooms at the station in question. *Ibid.*

9. *Instructions—Appeal and Error—Favorable Charge.*—A charge of the court to the jury that is favorable to the appellant cannot be considered as reversible error. *Ibid.*

10. *Instructions—Contradictory Requests.*—Where the question involved in an action against a physician for damages is whether the defendant should have discovered that his patient, a married woman who was pregnant, but whose case he had diagnosed and treated as one of tumor, for which he performed a surgical operation, a prayer for instruction which is contradictory and confusing, in assuming that a serious operation was to be performed for tumor to which plaintiff assented, and in another part that the plaintiff had not been informed thereof, is misleading to the jury, and was properly refused. *Brewer v. Ring and Valk*, 477.

11. *Instructions—Railroads—Fires—Spark Arresters—Defects—Evidence—Prima Facie Case.*—In an action to recover damages to plaintiff's land alleged to have been caused by a spark from defendant railroad company's passing locomotive emitted from a defective smokestack, or by reason of the negligent operation of the engine, it is necessary for the plaintiff to show that the fire was actually caused by a spark from the engine before any presumption of negligence arises, which would require the defendant to go forward with proof that its engine was equipped properly and was not negligently run, or take the chance of an adverse verdict. While a detached part of an instruction to the jury upon this question may be objectionable as requiring the defendant to give such evidence in explanation upon evidence merely as to the direction of the wind and the absence of other causes, etc., it will not be held as reversible error if other parts of the charge given in the same connection makes this basic finding necessary to give the plaintiff the benefit of the presumption and in such manner as that the jury could not have been misled. *Williams v. Mfg. Co.*, 512.

INSURANCE. See Principal and Surety, 4; Contracts, 15, 18.

1. *Insurance—Policy—Contracts—Ambiguity—Interpretation.*—A contract of life insurance is expressed in language selected by the insurer for its purpose, and in construing the policy all doubts as to its meaning in case of ambiguity will be resolved in favor of the insured. *Underwood v. Insurance Co.*, 328.

2. *Insurance — Contracts — Interpretation — Lex Loci Contractus.*—In an action brought in the courts of this State to recover upon a matured policy of life insurance issued and accepted by the insured in a sister State where the insured lived and died, the validity of the contract will be determined under the decisions of the courts of such other State. *Keesler v. Ins. Co.*, 394.

INSURANCE, FIRE.

1. *Insurance, Fire—Principal and Agent—Agent's Statements—Amount of Loss—Res Gestæ—Statutes—Evidence.*—A statement of an agent act-

INSURANCE, FIRE—*Continued.*

ing for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as our statute, Revisal, sec. 4755, requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. *Queen v. Ins. Co.*, 34.

2. *Insurance, Fire—Amount of Loss—Impeaching Evidence—Explanation —Trials—Questions for Jury.*—Where property that has been allotted as a homestead has been insured against loss by fire, and suit has been instituted against the insurer to recover the loss, and the plaintiff's exceptions to the value of the property so allotted has been introduced in evidence, showing that the value was claimed to be in a less sum than that demanded in the present action, it is competent for the plaintiff to explain that it was done to gain time and pay the debt, its credibility or weight being questions for the determination of the jury. *Ibid.*

INSURANCE, LIFE. See Insurance.

1. *Insurance, Life— Fraud— False Representations — Evidence.*—The insured may not sustain his action to recover the premiums paid on her policy of life insurance for several years, upon allegation that the agent of the insurer had fraudulently misrepresented that this could be done after a period of twelve years, when her own evidence shows she and the agent read the policy together, and he suggested that she have others read and explain it to her, which she did, and continued to pay the premiums, etc., and the policy itself clearly and unambiguously stated that the premiums would only be returned within two weeks from its date if the insured should be dissatisfied therewith. *Hughes v. Ins. Co.*, 156 N. C., 592, cited and distinguished. *Rice v. Ins. Co.*, 128.

2. *Insurance, Life — Policy — Assignment — Change of Beneficiary.*—The stipulation on a policy of life insurance to the effect that its beneficiary may be changed by the insured with the written endorsement thereon by the insurer, while it is unassigned, is to protect the insurer from liability to a stranger, and has no application where the policy has been assigned to the insurer to secure a loan made to the insured and the beneficiary, and the insurer thereafter permits a change of the beneficiary to the estate of the insured, and loans an additional sum thereon, taking the policy, properly assigned, as security for the payment of the second loan, also. *Underwood v. Ins. Co.*, 327.

3. *Same—Waiver.*—The stipulation on a policy of life insurance to the effect that the beneficiary may be changed, when unassigned, with the written endorsement thereon by the insurer, is one that the insurer may waive by its act or conduct, or by assenting thereto, unless it has previously been assigned to a stranger, in accordance with the policy provision, who has thereby acquired rights therein. *Ibid.*

4. *Insurance, Life—Extension Notes—Extended Insurance—Computation of Period.*—Where, for the payment of a premium due on a life insurance policy, the insurer has taken the note of the insured, called a "blue note," for the difference between a cash payment and the amount due, stating that no part of the premium has been paid, but

INSURANCE, LIFE—*Continued.*

that the policy would remain in force to the due date of the note, if paid by that time, otherwise it shall automatically cease to be a claim against the maker, the company to retain the cash as part compensation for the rights and privileges thereby granted, and the rights of the insured in the policy should cease, the payment of the cash and the giving of the note did not of itself work an extension, and its nonpayment, in accordance with its terms, renders the transaction the same as if the note had not been given; and the computation of extended insurance, in its relation to the money loaned the insured, as provided in the policy, will commence from the date the premium was due, and not from the due date of the note. *Ibid.*

5. *Insurance, Life— Loans— Premium Notes— Premiums— Extended Payments.*—Where upon the face of a policy of life insurance is given nonforfeitable values for loans, the company will make and also extended insurance set opposite each successive year, these values to be proportionately reduced in the event of any indebtedness against the policy, and requiring that premiums be paid to the next succeeding date, in determining the amount of the loan on the date of application therefor, the amount set opposite the date to which the premium had been paid, is that from which the loans made upon the assigned policy must be deducted, in determining the extension value of the policy, the requirement that the premium be paid to the next succeeding date having no relation to the amount the company will lend at that time; and no loan made to the insured will be considered in such computation unless made by the insurer upon the policy as security. *Ibid.*

INTENT. See Contempt, 1; Waiver, 1; Fraudulent Conveyances, 2; Wills, 8; Fraud, 1, 2; Evidence, 10; Domicile, 1; Homicide, 3.

INTEREST. See Dower, 1.

INTERSTATE COMMERCE. See Telegraphs, 1.

INTERVENING ACTS. See Negligence, 5.

INTOXICANTS. See Intoxicating Liquors.

INTOXICATING LIQUORS. See Homicide, 2.

1. *Intoxicating Liquors—Criminal Law—Manufacture— Evidence— Questions for Jury—Nonsuit—Trials.*—Evidence that the defendants, indicted for the unlawful sale of spirituous liquor, were the only ones found at a still, in active operation, within a mile of their home, one standing with his back to the fire of the still and the other reclining on the ground near-by, permits the inference that they were operating it, and is sufficient to take the case to the jury, and a motion as of nonsuit was properly denied. *S. v. Ogleston*, 541.

2. *Intoxicating Liquors—Criminal Law—Manufacture—Aider and Abettor —Instructions.*—Where the evidence is sufficient for the unlawful manufacture of liquor, a charge to the jury that they may find the defendants guilty if they were aiding or abetting such manufacture, under the statute (ch. 158, p. 310, Laws of 1917), was not erroneous. *Ibid.*

INTOXICATING LIQUORS—*Continued.*

3. *Intoxicating Liquors—Evidence—Denial—Admissions—Instructions.*—Testimony of a witness that the defendant remained silent when charged with selling spirituous liquor by those in whose possession it had been found, under circumstances affording him an opportunity for denial, free from restraint, is *prima facie* competent evidence upon his trial for violating the prohibition law of the State, though it should be cautiously received, with instructions to the jury as to its essential elements. *S. v. Pitts*, 543.

4. *Spirituous Liquors—Intoxicants—Possession—Purpose of Sale—Burden of Proof.*—Upon trial for having in possession more than one gallon of spirituous liquor for the purpose of sale, the sale of intoxicants is the gravamen of the offense, and the guilt of the defendant may be established whether he had a less quantity or not, the quantity specified making a *prima facie* case under the statute, the burden of proof in either event being upon the State to establish the facts that constitute the unlawful purpose of sale. *S. v. Simmerson*, 545.

5. *Spirituous Liquor—Possession—Evidence—Trials—Questions for Jury.* Evidence tending to show that the accused had more than one gallon of spirituous liquor for the purpose of sale in violation of the statute and arranged with the owner of an empty stable to place his trunk therein; that two trunks were hauled from the railroad depot there by a drayman hired by a third person, and one of these trunks were found by the police in the stable about dusk of the same day to contain thirty-six quarts of whiskey, and there was no explanation or evidence by the accused, who had disappeared at the time of the seizure and was afterwards brought back under arrest, is *held* sufficient to sustain a conviction. *S. v. Bush*, 551.

6. *Same—Accomplice—Principal and Agent.*—Where the evidence tends to show that the accused having more than one gallon of spirituous liquor for the purpose of sale had arranged with the owner of an empty stable for placing his trunk there, which was found on the same day to contain thirty-six quarts of whiskey, etc., other testimony that the trunk was hauled there by a drayman employed by a third person permits the inference by the jury that such third person acted either as the agent of or in collusion with the accused. *Ibid.*

7. *Spirituous Liquors — Possession — Instructions.*—Where the evidence tends to show that the defendant had more than one gallon of whiskey in his possession, an instruction to the jury that the State must show beyond a reasonable doubt the facts of possession, as well as the purpose of unlawful sale, is favorable to the accused, of which he cannot complain. *Ibid.*

8. *Spirituous Liquors—Possession—Denial—Evidence.*—Where a search warrant charges the possession of more than one gallon of whiskey, and forty-eight quarts are found, with evidence to show that it was in the actual or constructive possession of the defendant, it is sufficient for conviction, and the fact that he made no denial is competent evidence for the consideration of the jury. *Ibid.*

9. *Spirituous Liquors—Sentence—Hiring Out—Courts.*—Where the defendant is convicted of having more than one gallon of whiskey in his possession for the purpose of sale, a four-months sentence in jail is

INTOXICATING LIQUORS—*Continued.*

not excessive, and the court may give permission to work the prisoner on the public roads. *Ibid.*

10. *Intoxicating Liquors—Evidence—Character—Voluntary Answer of Witness—Sentences—Spirituous Liquors.*—Where the character of the defendant, on trial for violating the statute against the sale of spirituous liquor, is in evidence a witness, who has testified that he knows the general character of the defendant, may voluntarily and in order to speak the truth testify in answer to a proper question that the defendant's character for selling whiskey is bad. The propriety of a road sentence for the violation of our prohibition statutes, instead of the State's sharing in the illegal profit by the imposition of a fine, discussed by CLARK, C. J. *S. v. Butler*, 585.

IRREGULAR JUDGMENTS. See Judgments, 6.

ISSUES. See Usury, 1; Wills, 3; Appeal and Error, 10, 39; Contracts, 11; Fraudulent Conveyances, 3; Attachment, 3.

Issues—Court's Discretion.—The rejection of issues tendered to the trial judge is not error when the issues submitted arise from the pleadings, are supported by the evidence, and are sufficient to determine the rights of the parties and to support the judgment, the form and number thereof, when meeting these requirements, being within the sound discretion of the trial judge. *Brewer v. Ring and Valk*, 477.

JOINT TORTS. See Slander, 2, 4.

JOINDER. See Husband and Wife, 1; Parties, 1; Actions, 6.

JUDGE. See Courts, 8; Justice's Court, 2.

JUDGMENT ROLL. See Evidence, 3.

JUDGMENTS. See Ejection, 1; Appeal and Error, 14, 17, 29; Municipal Corporations, 10; Husband and Wife, 1; Motions, 1; Clerks of Court, 1; Attachment, 2, 4; Domicile, 2, 4; Pleadings, 13; Costs, 2; Indemnity, 1; Indictment, 1, 2.

1. *Judgments—Consent—Actions—Motions in Cause—Husband and Wife—Insanity.*—An action brought by the wife to set aside a compromise judgment concerning her lands, to which the husband was a party and agreed to by him at a time she was insane and confined in an asylum, with allegation of these facts, is a direct proceeding to set aside the judgment, and not a collateral attack thereon. *Craddock v. Brinkley*, 125.

2. *Judgments—Fraud—Independent Action—Motion in Cause—Court's Discretion—Same County.*—An indepedent action is the proper remedy to set aside a judgment on the ground of fraud, and on any other ground it should be by motion in the cause; yet where both actions are brought in the same county the court may, in its discretion, treat the summons and complaint in the second action as a motion in the original one. *Ibid.*

3. *Judgments—Estoppel—Estates—Contingent Interests—Statutes.*—A judgment in an action rendered adverse to the petitioner to sell lands, claiming title, where the inquiry only related to the petitioner's title

JUDGMENTS—*Continued.*

and right to sell, and involves the question as to whether the facts and conditions as alleged and then existent rendered the sale expedient and for the best interest of remote and unascertainable contingent interests in remainder, is not an estoppel in a subsequent action under changed conditions and brought under the provisions of Pell's Revisal, sec. 1590, authorizing such sale when its provisions are complied with. *Dawson v. Wood*, 159.

4. *Judgments—Non Obstante—Motions—Appeal and Error.*—A motion for judgment *non obstante veredicto* will not be sustained unless it appears from the pleadings and verdict, and not from the evidence, that the party is thereto entitled. *Nall v. McMath*, 184.

5. *Judgments—Estoppel—Tenants in Common—Severance of Possession—Title.*—As a general rule, a judgment does not work an estoppel of record as between the parties supposed to represent the same interest unless their rights and interests have been made the subject of inquiry and decision, nor in any event does an adversary judgment constitute an estoppel as to matters beyond the scope of the issues as presented and embraced by the pleadings; and where proceedings in partition of lands contemplates only a severance of possession between tenants in common, and not the question of title, a judgment therein does not estop one of them from maintaining an action to remove, as a cloud upon his fee-simple absolute title, which he claims by devise, the claims of others that the devise was only of a life estate with remainder over to themselves. *Nobles v. Nobles*, 243.

6. *Judgments — Default — Irregular Judgments.*—A judgment by default final taken in a suit to remove a cloud upon the title to the plaintiff's lands after summons has been duly issued and served, complaint filed without answer, etc., after several terms of the court have elapsed at which the cause was triable, is not irregularly entered or contrary to the course and practice of the courts. *Land Co. v. Wooten*, 248.

7. *Judgments Set Aside—Attorney and Client—Laches—Duty of Client.*—A defendant is not relieved of laches for failing to file his answer, or to see that the action is properly looked after, merely because he has employed an attorney for that purpose; and where the action has been duly commenced and complaint filed it is not excusable neglect sufficient to set aside a judgment by default final for want of an answer for him to show that he had employed an attorney to defend him, who was drafted into the army two months after the answer should have been filed and two terms of court had since passed before the judgment complained of had been entered. *Ibid.*

8. *Judgments Set Aside—Meritorious Defense—Evidence.*—The defense is not sufficiently meritorious to set aside a judgment final for want of an answer in a suit to remove a cloud upon the title to the plaintiff's land when it appears that both parties claim under grants and mesne conveyances from the State; that the plaintiff's grant was prior to defendant, and that he had also acquired title of the defendant's grantor prior to the execution and registration of his deed. *Ibid.*

9. *Judgments— Estoppel— Executors and Administrators— Sales— Assets.* Where a decree, in proceedings by an administrator to sell lands to make assets to pay a debt due by the estate to a bank, the bank not

JUDGMENTS—*Continued.*

having been made a party, orders the lands to be sold subject to the widow's right of dower, leaving the entire funds subject to the further order of the court, and it appears that thereafter the administrator ascertained that the intestate acquired title to a part of the lands only as the selling agent of the bank, it does not estop the administrator from showing the facts of the agency and the amount due the bank, this matter not having been adjudicated or passed upon in the special proceedings. *In re Gorham*, 271.

JUDICIAL SALES. See Evidence, 3; Deeds and Conveyances, 2.

JURISDICTION. See Courts, 2; Limitation of Actions, 5; Costs, 2; Removal of Causes, 2.

JURORS. See Courts, 6.

JUSTICES' COURTS.

1. *Justices' Courts—Appeal—Docketing Appeal—Term—Notice—Courts.*—The appellant from a justice of the peace judgment should docket his case at the next criminal or civil term of the Superior Court, and upon his failure to have done so the court has not the power to allow it, though when docketed in time the court may allow notice of appeal to be given *nunc pro tunc*. *Barnes v. Saleeby*, 256.

2. *Justices' Courts—Appeals—Terms—Judge's Absence—Procedure—Subsequent Term—Statutes—Courts.*—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over, under our statute, in the same plight and condition, to the subsequent term. Revisal, sec. 1510. *Ibid.*

3. *Same—Motions—Recordari.*—Where a justice of the peace has failed to send up a judgment appealed from in the time required by statute, the appellant should file his motion for a *recordari*, in the absence of the judge, to hold the courts at that term, which would carry the matter to the subsequent term for disposition. *Ibid.*

4. *Justices' Courts—Appeal—Term of Court—Motions—Optional Procedure—Dismissal—Courts.*—Where a transcript of judgment on appeal from a justice of the peace has not been docketed in the Superior Court at the proper term, the right of the appellee to have it docketed and dismissed under Revisal, 608, is optional, and the remedy given by the statute is not conclusive upon him. *Ibid.*

5. *Justices' Courts—Appeals—Docketing—Dismissal—Agreement of Parties—Courts.*—Where a justice of the peace judgment should be dismissed in the Superior Court for failure of the appellant to docket his appeal at the proper term, and the appellant has refused the appellee's offer to try the case upon its merits, its trial there otherwise must be with the appellee's consent, and the appeal will be dismissed. *Ibid.*

LABORERS. See Principal and Surety, 1, 8.

LACHES. See Judgments, 7; New Trials, 2.

LANDLORD AND TENANT. See Constitutional Law, 7; Appeal and Error, 28.

Landlord and Tenant — Lease — Contracts — Parol — Statutes of Fraud— Consideration.—A parol promise made by the lessor during the continuance of written lease for a term, that he would not thereafter rent the premises to another than the lessee, when occupied by him, without giving him an opportunity to renew the lease, is ineffectual, it being for an indefinite period void under the statute of frauds and without consideration. *Barnes v. Saleeby*, 257.

LARCENY.

Larceny—Evidence—Substantive Evidence—Impeaching Evidence—Trials —Questions for Jury.—Where the evidence tends to show larceny of a certain amount of money by the uncle of the prosecuting witness, and that another uncle proposed to the defendant to make it up, as it was a family affair, to which no reply was made, but the defendant's uncle procured and paid to the prosecuting witness a part of the amount, the balance being found and restored under circumstances tending to connect the defendant therewith, and that the defendant had agreed that a third person should pay the money back to the prosecuting witness, which plan was not followed: *Held*, under the circumstances of this case there was sufficient circumstantial evidence to connect the defendant with the return of the money by his uncle, and to make it competent as substantive evidence, and also impeaching evidence as it tended to prove an attempt to compound a felony. *S. v. Lunsford*, 117.

LEADING QUESTIONS. See Appeal and Error, 17.

LEASES. See Landlord and Tenant, 1; Husband and Wife, 9.

Leases—Betterments—Statute of Frauds—Parties—Cancellation—Lessor and Lessee.—Where the plaintiff brings his action of ejectment and for damages against the widow of the deceased lessor, who has taken possession under a claim of dower, and his administrator and heirs at law, and the statute of frauds is successfully pleaded as to the sufficiency of description of the lands in the written lease, under which he had put improvements upon the lands, the lessee is entitled to recover for betterments and to cancellation of note and chattel mortgage he has given thereon to secure the payment of the rent for the stated term of years, the joinder of the heirs at law as parties being surplusage. *Ingram v. Corbit*, 319.

LEGAL REPRESENTATIVES. See Wills, 13.

LEGISLATIVE APPROVAL. See Constitutional Law, 18.

LESSOR AND LESSEE. See Leases, 1; Parties, 1, 2; Ejection, 1; Actions, 6.

LETTERS TESTAMENTARY. See Executors and Administrators, 3.

LEX LOCI CONTRACTUS. See Insurance, 2; Contracts, 17, 18.

LIENS. See Husband and Wife, 4; Health, 1.

LIMITATION. See Taxation, 2.

LIMITATIONS OF ACTIONS. See Principal and Surety, 3; Deeds and Conveyances, 2.

LIMITATIONS OF ACTIONS—*Continued.*

1. *Limitations of Actions—Adverse Possession—Title.*—It is not required that adverse possession, to ripen title to lands under "color," should have existed during the period next preceding the commencement of the suit if such title had thereby at any time prior thereto, and this title will support a recovery unless subsequent to its vesting it had in some way been divested; nor is it necessary that such possession should have been unceasing if it is sufficient to warrant the inference that the actual use and occupation have extended over the statutory period. *Alexander v. Cedar Works*, 138.

2. *Same—Character of Possession—Color of Title.*—The character of adverse possession required to ripen title to lands under "color" of a paper-writing sufficiently describing them is the notorious, continuous and exclusive use thereof, for the statutory period, that the land is susceptible of in its present condition; and in instances of swamp lands, which could only be used for the purpose of cutting and removing trees therefrom, the cutting and removing of the trees with such frequency and regularity for the required period, as to give notice to the public owner of the paper title, that the claimant was claiming the land as his own, and to expose him to suits by the true owner is sufficient. *Ibid.*

3. *Limitation of Actions—Deeds and Conveyances—Minors—Fraud—Notice.*—Where an action is brought to set aside a deed to lands made by a minor more than three years after he has attained his majority, and it appears that the conveyance had been registered many years theretofore, the plea that the action was brought within three years after notice of the fraud is unavailing to stop the running of the statute of limitations. *Lanier v. Lumber Co.*, 202.

4. *Limitation of Actions—Deeds and Conveyances—Contracts—Accounting—Demand—Trusts—Principal and Agent.*—Under a valid contract that the grantee of lands pay one-third of the rents and profits to a prior encumbrance thereon until he be paid in full, and then reconvey a certain part thereof to his grantor: *Held*, the relation of the parties is one of trust and agency, during the continuance of which the grantee's possession is not inconsistent with the grantor's right of title, and the grantor's demand for an accounting and deed during that time is not sufficient to set the statute of limitation in motion in the grantee's favor, especially when no reply to the demand had been made, or the demand refused, and the grantor was not made aware of the status of the account until action was brought. *Hilton v. Gordon*, 342.

5. *Limitation of Actions—Executors and Administrators—Void Appointment—Clerks of Court—Jurisdiction—Actions—Parties.*—Where one has attempted to qualify as administrator under letters issued by the clerk of the Superior Court of a county having no jurisdiction, and brings his action within the time prescribed, and thereafter has qualified in the proper county and applied to the court for permission to become a party to the pending action, to recover damages for the negligent killing of his intestate, the two years within which the action may be brought under our statute having expired at the time of his application to become a party, it is error for the court to permit him to become a party, for the former proceedings could not be maintained

LIMITATIONS OF ACTIONS—*Continued.*

under a void qualification as administrator, and the course taken subsequently cannot have the effect of reviving them, as the requirement that the action for the death shall be brought within two years thereafter is a condition precedent annexed to the cause of action, and its prosecution, and not a statute of limitations. *Reynolds v. Cotton Mills*, 413.

LISTING. See Taxation, 5.

LOANS. See Insurance, Life, 5; Contracts, 21.

MAINTENANCE. See Easements, 2, 3.

MALICE. See Homicide, 3.

MALPRACTICE. See Evidence, 13, 14; Appeal and Error, 44.

MANDAMUS. See Municipal Corporations, 3; Schools, 1.

MANDATES. See Constitutional Law, 12.

MANSLAUGHTER. See Homicide, 2, 4; Negligence, 10.

MANUFACTURE. See Intoxicating Liquor, 1, 2.

MARRIED WOMEN. See Husband and Wife, 2; Partnerships, 1.

Married Women—Husband and Wife—Statutes—Certificates—Signs—Exemptions — Constitutional Law — Clerks of Court.—The failure of a married woman to comply with the provisions of Revisal, sec. 2118, and ch. 77, Laws of 1913, as to filing a certificate with the clerk of the court and displaying her name at the place of business conducted by her, does not deprive her of her constitutional right (Art. X, sec. 1) of having her personal property exemption out of the assets of the business. *Grocery Co. v. Bails*, 299.

MASTER AND SERVANT. See Indemnity, 1; Negligence, 9.

1. *Master and Servant — Employer and Employee — Safe Appliances — Minors — Duty of Master — Instructions.*—Where there is evidence tending to show that plaintiff, a 17-year-old lad, was instructed by his superior to operate a rapidly revolving power-driven saw at a grooving machine, against his protest, being inexperienced therein; that the machine, being worn, shaky and antiquated, without proper guards, and being at the time jarred by the slipping of a belt at a neighboring machine, causing the wood thereon to fall upon the revolving saw and thrown violently against the plaintiff, to his injury; that the plaintiff had received no instructions as to operating the machine, and no warning as to its dangers: *Held*, the charge of the court as to the duty of the employer to furnish to his employee reasonably safe appliances to do the work required of him, and to instruct a lad of his age in doing work of this character, is approved. *Ensley v. Lumber Co.*, 165 N. C., 687; *Adkins v. Madry*, 174 N. C., 187, and like cases, cited and applied. *Holt v. Mfg. Co.*, 170.

2. *Master and Servant—Employer and Employee—Duty of Master—Negligence—Safe Place to Work—Tools and Appliances—Order of Vice Principal.*—In applying the principle requiring an employer, in the exercise of reasonable care, to furnish his employees a safe place to

MASTER AND SERVANT—*Continued.*

work and suitable tools and appliances therefor, including simple, ordinary tools, wherein the defect and the character of the work required by their use is of a kind to impart serious menace, and of which the employer knew or should have known by ordinary inspection, regard should also be had to circumstances, when they arise, tending to show that the employee acted in an emergency to his injury under the direct order of his superior employee, or the vice principal of his employer, directing the work at the time, with a natural impulse of present obedience. *Thompson v. Oil Co.*, 279.

3. *Same—Evidence—Instructions—Trials.*—In an action against an employer to recover damages for a personal injury alleged to have been caused by its negligence, there was evidence tending to show that the plaintiff, employed for other duties, was directed by defendant's vice principal to "scotch" a car operated by the defendant on a railroad track, at the place it was desired, and when it was rolling down grade with sufficient force to have crushed a plow point that the vice principal had placed to mark the place; that at the time the only implement the plaintiff had was similar in shape to a crow-bar, the end of which he placed upon the track, resulting in the other end striking him on the head, causing serious injury: *Held*, sufficient upon which the jury could find that the plaintiff acted in an emergency under the negligent order of the defendant's vice principal, and a request for instruction was properly denied that the jury find the issues of negligence, contributory negligence, and assumption of risk in defendant's favor should they find the facts according to the evidence in the case. *Ibid.*

MATERIALMEN. See Principal and Surety, 1, 8.

MENTAL ANGUISH. See Telegraphs, 1.

MERCHANDISE IN BULK. See Receivers, 6.

MERGER. See Trusts and Trustees, 1.

MERITORIOUS DEFENSE. See Appeal and Error, 27; Judgments, 8.

MINORS. See Master and Servant, 1; Limitation of Actions, 3.

MISDEMEANOR. See Arrest, 1.

MISJOINDER. See Actions, 1.

MISREPRESENTATIONS. See Deeds and Conveyances, 6.

MISTAKE. See Deeds and Conveyances, 12; Husband and Wife, 6; Physicians and Surgeons, 1.

MOB. See Murder, 1.

MORAL TURPITUDE. See Slander, 3.

MORTGAGE. See Deeds and Conveyances, 1, 4, 12; Fraud, 2; Courts, 4; Contracts, 12, 21; Husband and Wife, 9; Fraudulent Conveyances, 5; Removal of Causes, 3.

MOTIONS. See Indictment, 1, 2; Wills, 4; Clerks of Court, 1; Judgments, 4; Actions, 4; Justices' Courts, 3, 4; Costs, 2; Removal of Causes, 1, 2.

MOTIONS—*Continued.*

Motions—Judgments—Attorney and Client—Attorney in Fact—Principal and Agent—Demurrer—Form of Motion.—While it is the better form for one making a written motion, as attorney at law and in fact for the heirs at law of the original owner, to set aside a judgment rendered by the clerk of the Superior Court, in proceedings for partition of lands, to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., as the heirs at law of the deceased, is merely informal and harmless, and therefore good against a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is solely acting in a representative capacity for the persons named. *Hartsfield v. Bryan*, 166.

MOTIONS IN CAUSE. See Judgments, 1, 2.

MUNICIPAL CORPORATIONS. See Constitutional Law, 1; Condemnation, 1, 2, 3; Taxation, 8; Health, 1.

1. *Municipal Corporations—Cities and Towns—Streets—Grading—Damages—Statutes—Dedication—Presumptions—Negligence.*—An act providing that, in changing the grade of its street, an incorporated city shall cause a map to be made, showing the nature and extent of the proposed change, and, on request of an abutting owner, the mayor and aldermen shall cause a special jury, definitely provided for, to assess the owner's damages and benefits, and make report, upon which the authorities may decrease or remit items, or abandon the plan if the costs appear unsatisfactory, destroys the ordinary presumption that the right to thus grade the street passed to the city upon the original dedication of the street. *Keener v. Asheville*, 1.

2. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Damages—Preliminary Assessment—Statutes.*—Where a statute provides a method, upon demand of an abutting owner, for ascertaining by a special jury the damages to be caused by a proposed grading or improvements of its streets, with report to the city board of aldermen, who may change the items or abandon the plan if the costs are unsatisfactory: *Held*, the requirement for the appointment of a jury and assessment and report, under the prescribed method, is not jurisdictional in its nature, but a preliminary proceeding before an administrative board to enable it to intelligently decide whether they would abandon or go on with the improvement, and if they determine to proceed to afford it opportunity to make an adjustment with the claimants and avoid the costs of adversary proceedings. *Ibid.*

3. *Same—Demand—Actions—Mandamus.*—Where provision is made by statute for a preliminary investigation by an incorporated city to determine whether or not an improvement of its streets by grading, etc., should be made, upon demand by abutting owners, to whom a right of action for damages to their lands is given, and therein the board of aldermen act in an administrative capacity, the owner may bring his action to recover his damages thus caused, after making his demand upon the city, in accordance with the act, and a denial of any liability thereunder; and a mandamus to compel the board to proceed by the statutory method is not required. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

4. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Improvements—Assessments.*—Municipal corporations, acting under authority conferred by statute may make assessments upon the land abutting upon the street for public-local purposes, according to any of the recognized methods of procedure and apportionment, including both the front-rule as well as the creation of local assessment districts. *Felmet v. Canton*, 52.

5. *Same—Statutes—Taxation—Discretionary Powers—Courts.*—The authority conferred by statute on municipal corporations to assess lands abutting upon the streets for public-local purposes comes within the power of taxation and is largely a matter of legislative discretion, usually held to be conclusive as to the necessity of the improvement, and in respect to the apportionment and the amount only becomes a judicial question in cases of palpable and gross abuse. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Assessments—Notice—Objection—Estoppel.*—Where the notice provided by the statute has been given the owners of land abutting on a street of assessments to be made on their property for street improvements, and an opportunity to be heard thereon is afforded them before the designated authorities, and no objection is made as to the amount, the owner is usually estopped from questioning the validity of the assessment when determined upon by the method prescribed. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Water Pipes—Assessments—Front-Foot Rule—Statutes—Tax Districts.*—Where the commissioners of a town, acting in pursuance of a statute, have laid pipe lines along certain designated streets, in extension of the water system, and assessed the costs one-third each against the abutting owners on either side of the streets, and apportioned such costs in an assessment according to the front-foot rule, and have given proper notice of such assessment required by the statute, and no objection was made by any of the property owners, and it does not appear that there is anything unjust or oppressive, either in the improvements itself or the method or amount of the assessment, the statute having provided for the method of assessment by the front-foot rule: *Held*, objection that a taxing district should have been formed is untenable, and a temporary restraining order theretofore issued was properly dissolved. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Profits—Governmental Functions—Water Pipes—Assessments.*—The principle upon which a municipality engaged in supplying water to the individual citizen, under contract for profit or pay, must be considered and dealt with as a private owner, applies to the ordinary burdens and liabilities incident to their private business relations, and not to its work for the public generally, such as procuring its water supply and extending it, providing for fire protection and sanitation purposes, and the like, for therein the municipality is to be regarded as a governmental agency and, as such, possessing and capable of exercising the powers and privileges conferred upon it by law. *Ibid.*

9. *Municipal Corporations—Sales—Taxes—Tender—Waiver—Actions—Cloud on Title—Equity.*—Where lands have been sold by a county or

MUNICIPAL CORPORATIONS—*Continued.*

municipality for the nonpayment of taxes, and the one claiming as the true owner brings suit to remove the sheriff's deed as a cloud upon his title, a refusal of the amount thus due, by the one entitled to receive the taxes, is a waiver of any tender of the taxes as required by the statute, and the plaintiff may maintain his suit. *Headman v. Comrs.*, 261.

10. *Same—Judgments.*—Where the plaintiff has succeeded in his suit to remove a tax deed as a cloud upon his title to lands, the courts will require as a condition of entering judgment upon the verdict that plaintiff pay into court the amount of the taxes, for the use of the party entitled thereto, or to him directly, with any other amount due by way of penalty or interest. *Ibid.*

MUNICIPALITIES. See Taxation, 6.

MURDER. See Homicide, 3; Appeal and Error, 51; Courts, 7.

1. *Murder—Evidence—Highway Robbery—Mob—Unlawful Purpose—Res Gestæ.*—Where there is evidence that the prisoner, on trial for murder, was in a crowd at night organized for the purpose of committing highway robbery, and that after the mob had held up an automobile in which the deceased was riding, the prisoner deliberately and premeditatedly shot and killed him without provocation, it is unnecessary to show that the prisoner himself had joined in with the cry of the mob, "Let's stop him," in order to make such exclamations competent on the trial, such being indicative of the unlawful purpose of the crowd with which he was acting, tending to show the *quo animo* of their actions and being a part of the *res gestæ*. *S. v. Davis*, 573.

2. *Same—Intermediate—Declarations—Continuous Transactions.*—Where there is evidence tending to show that the deceased was a member of a crowd assembled for the unlawful purpose of committing highway robbery at night, and that after the mob had held up a passenger in an automobile the prisoner deliberately and premeditatedly shot and killed him with a pistol, without provocation, it is not necessary to show that the prisoner was personally present at an intermediate time and had joined in with the cry halting the deceased, as such is within the *res gestæ*, being a part of the whole transaction of a connected and continuous nature from beginning to end. *Ibid.*

NATIONAL BANKS. See Banks and Banking, 3.

NECESSARY EXPENSES. See Constitutional Law, 13, 15, 16.

NEGLIGENCE. See Municipal Corporations, 1; Railroads, 1; Corporations, 4, 6, 7; Master and Servant, 2; Pleadings, 1, 8; Carriers of Passengers, 1; Easements, 2; Physicians and Surgeons, 1; Evidence, 7; Verdict, 2; Appeal and Error, 22, 45; Contracts, 7; Instructions, 3, 5, 7.

1. *Negligence—Evidence—Statutes—Highways—Automobiles—Nonsuit—Trials.*—Where there is evidence tending to show that one driving an automobile along a country road, sufficiently wide, failed, as required by an existing statute, to turn out upon meeting a pedestrian leading two mules, and ran upon and killed one of the mules, and that the pedestrian had turned out on his side as far as the road permitted: *Held*, his breach of the statute is negligence, entitling the owner of

NEGLIGENCE—*Continued.*

the mule to recover if it was the proximate cause of the injury thereto, and in this case a motion to nonsuit upon the evidence, viewed in the light most favorable to the plaintiff, was properly denied. *Goodrich v. Matthews*, 198.

2. *Negligence—Evidence—Fires—Damages—Deeds and Conveyances.*—A., the owner of lands, conveyed the standing timber thereon to B., who conveyed it to C., and the latter contracted with D. to cut or manufacture the same on the premises, and while so doing D. set fire to the lands of A. and adjoining owners, who brought their action against B., C., and D. for the resultant damages: *Held*, as between the parties, it was not required that the deed from B. should have been registered before the fire occurred, and though registered during the trial it was competent as evidence of a registered instrument, and if established passed the title to the timber and relieved B. from liability in the action. *Royal v. Dodd*, 206.

3. *Negligence — Fires — Stationary Engines — Evidence — Prima Facie Case.*—Where there is evidence tending to show that soon after defendant commenced cutting or manufacturing timber on the plaintiff's land with a stationary steam engine equipped with a ten-foot smokestack, fire was set out upon inflammable surroundings and communicated to plaintiff's lands to his damage, a *prima facie* case of negligence is made out against the defendant, affording evidence that the engine was not equipped with a proper spark arrester. *Ibid.*

4. *Negligence— Fires— Faulty Locomotives— Defects— Evidence.*—In an action to recover damages for the faulty construction of the defendant's locomotive, operated over its tramroad, in setting out fire to the plaintiff's lands, evidence is competent that the defendant's engine threw out sparks and live coals while passing the witness one week before the occurrence, which set out fires, it appearing that the defendant had only one engine, and were it otherwise the evidence should be received when it is shown by the defendant's evidence that the engine was in the same condition on both occasions. *Balcum v. Johnson*, 213.

5. *Negligence — Intervening Acts — Damages — Independent Cause — Liability.*—In order for the act of an intelligent intervening agent to break the sequence of events and protect the author of a primary negligence from liability, it must be an independent, superseding cause and one that the author of the primary negligence had no reasonable ground to anticipate, and must be in itself negligent or at least culpable. *Ibid.*

6. *Same—Fires—Conflagrations—Back Fires—Causal Connection.*—Where in an action to recover damages of the defendant caused by fire set out by the negligent construction of its locomotive, which dropped live sparks and coals as it passed along upon the defendant's tramroad, there is evidence tending to show that it caused a conflagration importing menace to the principal and adjacent property, endeavor to prevent its spread by back firing is a method approved and frequently resorted to, wherein the conduct of participants is not to be considered or judged with the critical scrutiny that may obtain in more deliberate circumstances; and where there is evidence that one of the participants started a back fire, in a reasonable effort to extinguish

NEGLIGENCE—*Continued.*

the fires, an instruction by the court to the jury that the plaintiff should recover if they accordingly found the facts to be, is a proper one, as the intervening act would not break the causal connection with the defendant's original wrong, the same being neither independent, improbable or culpable. *Ibid.*

7. *Negligence—Fires—Parties—Remainderman—Life Tenant—Restricted Damages—Trials—Appeal and Error.*—The remainderman after a life estate in lands may sue to recover damages to his interest in lands without joinder of the life tenants; and it appearing in this case, on appeal, interpreting the verdict in the light of the language of the issue, the charge of the court, and the exclusion of evidence tending only to show injury to the life estate, that the damages were confined to those of a permanent nature and solely affecting the remainderman, the objection that a recovery had been permitted of the entire damages, without having made the life tenant a party, is untenable. *Ibid.*

8. *Negligence—Principal and Agent—Scope of Agency—Instructions—Trials.*—Where the plea of contributory negligence of the plaintiff's agent in not completely extinguishing a fire set out by the defendant railroad company is available to the defendant in the action, and there is supporting evidence, a requested instruction that excludes the principle as to whether it was within the scope of the agent's duty, as such, to extinguish the fire, is properly refused. *Kearney v. R. R.*, 252.

9. *Negligence—Explosives—Dynamite—Master and Servant—Evidence—Instructions—Trials.*—In this action to recover damages for the alleged negligence of defendant's employees having in their possession, with the knowledge of the defendant and for his use, dynamite caps, one of which was carelessly left or exposed and exploded, causing the injury to plaintiff, defendant's lessee, while engaged in defendant's service, the evidence was unconflicting that, of two of these employees, the caps in their possession could not have caused the injury, or that the defendant could not have been aware of the fact that they had them, leaving evidence only of one of these employees having the caps under circumstances wherein the defendant could have been held responsible: *Held*, not error to the plaintiff's prejudice for the judge in his charge to confine the jury in their inquiry to this one employee, and not objectionable under a further charge that the defendant would be responsible if any employee had carelessly so left these caps that they exploded, and thus proximately caused the injury alleged. *Langley v. Misenheimer*, 538.

10. *Negligence—Criminal Law—Evidence—Homicide—Manslaughter—Instructions—Trials—Statutes.*—Upon an indictment for criminal negligence in running an auto truck in a city, there was evidence tending to show that the defendant was driving the truck along the street in a populous and principal residential portion of the city, at a rate of speed greatly in excess of the speed limit imposed by statute, that the view was unobstructed for some distance, and defendant having seen children upon the sidewalk or street in front of him, crossed an intersection of another street about 87 to 162 feet from where the children were playing, without giving the signal required by the statute or diminishing his speed, and while talking to another person on the

NEGLIGENCE—*Continued.*

sidewalk, with his head turned aside for the purpose, unexpectedly and without warning changed his course and ran upon the deceased child, inflicting the injury causing the death: *Held*, viewing the evidence in a light most favorable to the State, and disregarding the defendant's evidence to the contrary on his motion as of nonsuit, it was sufficient to be submitted to the jury and to sustain a verdict of involuntary manslaughter; and a charge that the defendant was guilty of involuntary manslaughter, if his excessive speed caused the truck to strike the child, or if the speed was not excessive, but the injury was caused by his carelessness and negligence in failing to keep a lookout ahead, is approved. *S. v. Gash*, 595.

NEW TRIALS. See Appeal and Error, 37; Evidence, 13.

1. *New Trials—Appeal and Error—Accounts—Credits—Newly Discovered Evidence.*—Where it appears on appeal in an action involving an account between the parties that the judge failed to regard a paid check given by one of them to the other as evidence, and the credit was not allowed, the check may be regarded in the Supreme Court as newly discovered evidence and the case remanded for it to be passed upon. *Williams v. Kearney*, 531.

2. *New Trials—Newly Discovered Evidence—Laches—Burden of Proof.*—The Supreme Court will not order a new trial for newly discovered evidence that is merely cumulative, or without probability that the result would be thereby changed, and the burden is upon the petitioner to show by the facts and circumstances, and not by his bare general averment, that he has been free from laches in not having produced it at the trial, or that its omission was not due to his lack of reasonable diligence. *Alexander v. Cedar Works*, 536.

NEWLY DISCOVERED EVIDENCE. See New Trials, 1, 2.

NEXT FRIEND. See Husband and Wife, 2.

NEXT OF KIN. See Executors and Administrators, 3.

NON OBSTANTE. See Judgments, 4.

NONSUIT. See Negligence, 1; Railroads, 1; Intoxicating Liquors, 1; Homicide, 3.

NOTES. See Insurance, Life, 4, 5.

NOTICE. See Principal and Surety, 6; Register of Deeds, 2; Municipal Corporations, 6; Statutes, 1; Evidence, 4; Deeds and Conveyances, 10, 15; Limitation of Actions, 3; Banks and Banking, 2; Justices' Courts, 1.

NUNC PRO TUNC. See Courts, 6.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 4, 8, 13, 15, 16, 18, 19, 23, 24, 29, 34, 38, 45, 50, 53, 54; Instructions, 2; Evidence, 17.

OBSTRUCTING JUSTICE. See Criminal Law, 5.

OFFICERS. See Slander, 1, 4; Evidence, 11; Principal and Agent, 2; Arrest, 1; Convicts, 1.

OPERATIONS. See Physicians and Surgeons, 1.

OPINIONS. See Evidence, 14.

OPINION OF JUDGE. See Trials, 1; Courts, 3.

ORDERS. See Banks and Banking, 1; Contempt, 1.

ORDINANCES. See Cities and Towns, 1; Health, 1.

OWNERS. See Taxation, 5.

PAROL. See Landlord and Tenant, 1.

PAROL LEASE. See Appeal and Error, 28.

PAROL TRUSTS. See Trusts, 1.

PARTIES. See Principal and Surety, 1; Taxation, 7; Slander, 2, 4; Estates, 2, 4; Negligence, 7; Actions, 3, 4; Leases, 1; Ejection, 1; Trusts, 1; Contracts, 20; Limitation of Actions, 5; Domicile, 4.

1. *Parties—Joinder—Ejection—Damages—Possession—Lessor and Lessee—Contracts—Breach—Widows—Heirs at Law—Executors and Administrators.*—The widow, the administrator, and the heirs at law of the deceased owner of lands are proper parties to an action of ejectment and to recover damages brought by the lessee of lands for a term of years for breach of the lease by the entry of the widow under proceedings for dower, wherein the *locus in quo* had been included. *Ingram v. Corbit*, 318.

2. *Parties — Lessor and Lessee — Dower — Allotment — Heirs at Law — Widow.*—Where the widow wrongfully claims and is in possession of lands during the continuance of a lease thereof made by her husband, since deceased, as a part of her dower laid off to her in proceedings therefor, the heir at law is a proper and necessary party in the lessee's action to reallot her dower and to repossess the land covered by the lease. *Ibid.*

3. *Parties—Statutes—Governor—State Board of Agriculture—State Warehouse Superintendent—Cotton Warehouse Act.*—The Governor, under the provisions of the Revisal, sec. 528, is the proper party plaintiff in an action for mandamus to compel the State Tax Commission to provide and enforce the machinery for the collection of the tax of twenty-five cents upon each bale of cotton ginned, etc., as provided by chapter 168, Public Laws of 1919, entitled "An act to provide improved marketing facilities for cotton"; and the State Board of Agriculture and the State warehouse superintendent are also proper parties plaintiff under section 2 of the act in question, requiring that its provisions shall be administered by them. *Bickett v. Tax Commission*, 433.

PARTNERSHIP. See Contracts, 6.

Partnership— Husband and Wife— Married Women— Exemptions— Statutes—Constitutional Law.—Under the provisions of Article X, section 1, of our Constitution, and since the Martin Act, ch. 109, Laws of 1911, making a married woman liable for her contracts, the wife may claim her personal property exemption from the assets of a partnership with her husband, when the validity of the partnership contract is not questioned by them under the provisions of Revisal, sec. 2107, and each has consented that such exemption should be allowed to the other therefrom. *Grocery Co. v. Bails*, 298.

PAYMENT. See Taxation, 1, 4.

PEDIGREE. See Evidence, 2.

PEONAGE. See Debtor and Creditor, 1.

PERSONALTY. See Removal of Causes, 3.

PHYSICIANS AND SURGEONS. See Evidence, 13, 14; Appeal and Error, 44.

Physicians and Surgeons—Diagnosis—Negligence—Treatment—Operation—Mistake—Evidence—Questions for Jury—Trials.—Where a physician has carefully obtained the necessary data for the diagnosis of a case by a proper examination of his patient and from information given him by the patient and other reliable sources, and possessing the requisite qualifications, applies his skill and judgment with due care, he is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making the diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice; but if he negligently omits to inform himself of the facts and circumstances, and injury results therefrom, he is liable for the consequent damages, the question of negligence being one for the jury when it arises upon the pleadings and the evidence in the case. *Brewer v. Ring and Valk*, 477.

PLEADINGS. See Corporations, 6; Discovery, 1; Instructions, 1; Deeds and Conveyances, 6; Taxation, 4; Fraudulent Conveyances, 1; Usury, 4; Evidence, 13; Register of Deeds, 2.

1. *Pleadings—Demurrer—Corporations—Directors—Negligence—Damages.* Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges, in effect, that the defendants had left the entire management of the corporate business to the secretary without supervision or requiring bond or accounting from him, etc.; that they had not held a directors' meeting for a year, in which time the secretary of the company had misappropriated a large sum of money, causing the insolvency, and that judgment had been obtained against the corporation; that they did not know that the secretary had defaulted until he had confessed thereto, etc.: *Held*, a good cause of action is stated, which, if established, the defendants, or those of them in default, may be held liable for the loss which resulted as the proximate cause of their negligence, and a demurrer thereto is bad. *Besseliew v. Brown*, 65.

2. *Pleadings—Aider—Speaking Demurrer.*—Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges a good cause of action for damages arising from their negligence in managing the corporate affairs, a demurrer may not be aided by allegations of facts not therein appearing, for such would be a speaking demurrer, condemned both under the common law and code systems of pleadings. *Ibid.*

3. *Pleadings—Deeds and Conveyances—Seals—Evidence—Record—Executors and Administrators—Wills.*—It is not necessary to allege a defect or mistake in deed not under seal, conveying land, when made by

PLEADINGS—*Continued.*

an executor under a power contained in the will to enforce it in equity against the heir at law, such fact appearing on the face of the record and its establishment dependent entirely on the documentary evidence. *Vaught v. Williams*, 78.

4. *Pleadings — Statutes — Cause of Action — Demurrer.*—Under our Code system, a pleading will be sustained against a demurrer if, when liberally construed, the whole or any part thereof presents facts sufficient to constitute a cause of action, or if such facts can be gathered from it, though the pleader may not disregard the ordinary and familiar rule that the facts should be concisely and plainly stated, so that it may appear, at least, with reasonable certainty what is the controversy and what are the essential issues to be submitted to the jury, upon which the case may be tried on its merits. *Hartsfield v. Bryan*, 166.

5. *Pleadings—Fraud—Treaty—Consideration—Deeds and Conveyances.*—In an action to set aside a deed for fraud, alleging that there was more land within the description than was intended to have been conveyed, and that the grantee knew of the plaintiff's unregistered deed conveying a part of this land when he bought; that the plaintiff was then in possession and the defendant had the lands surveyed and included the plaintiff's land in his deed, and that the defendant induced his grantor to sign by deceit: *Held*, the allegations were only sufficient for fraud in the treaty or consideration and not in the *factum*, and not sufficient to render the deed voidable, allegations being necessary in the latter instance that the grantor could not read, or was prevented from reading his deed before signing, or that the deed was read incorrectly, or that he did not sign the paper he intended to sign. *Lanier v. Lumber Co.*, 201.

6. *Pleadings—Allegations—Fraud—Deceit.*—Where the statement of facts alleged in the complaint in an action to set aside a deed on the grounds of fraud are insufficient to constitute it, the bare allegation that the grantor therein was induced to sign the conveyance by deceit is insufficient. *Ibid.*

7. *Pleadings—Principal and Agent—Husband and Wife—Wife's Separate Lands—Relief.*—Where the husband has acted as the plaintiff's agent for the sale of fertilizer, and also as the agent of his wife in cultivating her lands, an action against the wife to subject the crop to the payment of the husband's debt cannot be maintained, and the guano company may recover for the fertilizer used on the wife's crops, with which she is properly chargeable, after deducting such sums of money as the husband may have received on the purchase price of the fertilizer as the agent of the plaintiff, though such relief was not specifically prayed for in the complaint. *Guano Co. v. Colwell*, 219.

8. *Pleadings— Contributory Negligence— Negligence— Fires— Railroads— Statutes.*—The plea that an employee of the plaintiff had negligently failed to see that he had entirely extinguished a fire started by the locomotive of the defendant railroad company, and that the fire rekindled and caused the plaintiff the damages complained of in his action, is one of contributory negligence required by the statute to be pleaded. Revisal, sec. 483. *Kearney v. R. R.*, 251.

PLEADINGS—*Continued.*

9. *Pleadings— Allegations— Cause of Action— Defective Statement— Evidence.*—Where there is neither allegation nor proof that a deed to land, absolute on its face, sought to be declared a mortgage, had the redemption clause omitted upon grounds sufficient for the purpose, the action is one where a fact, essential to support a judgment in plaintiff's favor, is entirely lacking, rendering inapplicable the principle that a defective statement of a cause of action may be supplemented or cured. *Williamson v. Rabon*, 303.

10. *Pleadings—Demurrer—Statute of Frauds.*—In the lessee's action to repossess lands covered by his lease, the statute of frauds may not be taken advantage of by demurrer, upon the ground that the *locus in quo* was not sufficiently described in the lease; and where the plaintiff was at least a tenant from year to year he is entitled to damages for a wrongful breach of his lease by the widow claiming dower therein. *Ingram v. Corbit*, 319.

11. *Pleadings—Demurrer.*—The allegations of the complaint are admitted upon demurrer and liberally construed in favor of the pleader. *Crane Co. v. Longest & Tessier Co.*, 346.

12. *Pleadings—Statutes—Federal Statutes— Interpretation— Courts— Federal Courts.*—The local or State law as to pleadings and procedure ordinarily permitted and allowed by the Federal courts to control in actions in the State courts involving Federal questions, cannot be extended so as to include instances wherein a particular method is specially prescribed by the Federal law, as interpreted by the United States Supreme Court, although this interpretation may be at variance with the decisions of the State courts upon the same statute or a similar enactment by the Legislature of the State. *Bank v. Wysong & Miles Co.*, 380.

13. *Pleadings — Demurrer — Judgments — Injunction — Cloud on Title — Equity.*—In a suit to restrain the execution under a judgment and to remove the lien thereof as a cloud upon the title to plaintiff's lands, there was allegation that the plaintiff was a purchaser of the lands, and obtained his deed therefor, at a sale made in pursuance of a judgment entered by consent of the defendant and his creditor that title in fee should be made to the purchaser under the consent judgment, and that at the time the consent judgment was entered and the subsequent taking of his deed the defendant had acquired the prior judgment under which the execution was threatened without divulging the same: *Held*, a demurrer to the complaint was bad and plaintiff's motion to continue the restraining order to the hearing was properly allowed. *Church v. Vaughn, Hemphill & Co.*, 431.

14. *Pleadings—Amendments—Court's Discretion—Appeal and Error.*—The action of a trial judge in permitting an amendment to an answer during the trial is a matter within his discretion and not reviewable on appeal in the absence of gross abuse thereof. *Brewer v. Ring and Valk*, 476.

POISON. See Homicide, 1, 2.

POLICY. See Insurance, 1; Insurance, Life, 2.

POLL TAX. See Constitutional Law, 8.

POSSESSION. See Deeds and Conveyances, 4, 9; Judgments, 5; State's Lands, 1; Parties, 1; Intoxicating Liquors, 4, 5, 7, 8.

POWERS OF SALE. See Wills, 9, 10.

POWER OF APPOINTMENT. See Trusts and Trustees, 3.

PRAYERS FOR INSTRUCTION. See Indictment, 3.

PREJUDICE. See Appeal and Error, 21, 33, 50.

PREMIUM. See Principal and Surety, 2; Insurance, Life, 5.

PRESENCE. See Wills, 17, 18.

PRESUMPTIONS. See Homicide, 1; Deeds and Conveyances, 8; Husband and Wife, 3, 8; Appeal and Error, 30, 38, 40; Common Law, 1.

PRIMA FACIE CASE. See Negligence, 3; Instructions, 11.

PRINCIPAL AND AGENT. See Insurance, Fire, 1; Negligence, 8; Husband and Wife, 1, 3, 5; Motions, 1; Contracts, 7; Pleadings, 7; Intoxicating Liquors, 6; Principal and Surety, 6; Constitutional Law, 7; Evidence, 9, 18; Limitation of Actions, 4.

1. *Principal and Agent—Acts—Declarations—Evidence.*—Evidence of the agency is competent when the acts done by the agent in the course of his employment are so open and continued and of such character as to infer authority actually possessed by him, though, as a general rule, such agency may not usually be shown by the acts or declarations of the agent. *Lumber Co. v. Johnson*, 45.

2. *Principal and Agent—Evidence— Corporations— Officers.*—Declarations of an agent made concerning matters within the scope of his authority, and which he was transacting for his principal at the time, are competent evidence against his principal, and this principle applies to corporations acting through its agents. *Bank v. Wysong & Miles Co.*, 285.

PRINCIPAL AND SURETY. See Contracts, 15.

1. *Principal and Surety— Contracts— Bonds— Materialmen — Laborers— Parties.*—Laborers or materialmen may recover from the surety on a bond given by the contractor for the performance of his contract to erect a building, etc., when by express provision this liability is covered by the terms of the bond, or when it appears by fair and reasonable intendment therefrom that these rights were provided for and therein contemplated. *Lumber Co. v. Johnson*, 44.

2. *Same—Premium—Consideration.*—Where it appears that the attorney for the owner of a building to be erected required of the duly authorized agent of the surety that the bond provide for the payment of laborers and materialmen, for which provision an extra premium had been demanded and received, and the relative terms expressed in the bond were that it should be liable for payment of labor and material provided for in the contract: *Held*, the laborers on and the furnishers of material used in the building have a right of action against the surety on the bond, and may recover the amounts of their respective claims, proportionate to whatever amount, if anything, is in the

PRINCIPAL AND SURETY—*Continued.*

hands of the owner for distribution among such claimants under the provision of the lien laws. *Ibid.*

3. *Principal and Surety— Contracts— Bonds— Breach— Limitation of Actions.*—A surety bond given by the contractor to the owner of a building to be erected, providing for the payment of laborers and men furnishing material for the building, provided, among other things, that no suit, action or proceeding, by reason of any default, shall be brought against the principal or surety, or shall recovery be had for damages accruing after a certain future date: *Held*, the restrictive stipulations refer to suits seeking to recover damages which might accrue after the time stated, and do not affect the subsequent maintenance of an action to recover damages having theretofore accrued. *Ibid.*

4. *Same—Insurance—Statutes.*—Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract are regarded in the nature of contracts of insurance coming under the provisions of Revisal, ch. 100, sec. 4805; and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Revisal, sec. 4809. *Ibid.*

5. *Same—Public Policy—Stipulations.*—Revisal, sec. 4805, fixing a limitation of time in which actions shall be brought on a contract of indemnity or surety bond for the performance of a builder's contract indemnifying the owner, the laborer, and materialmen against loss arising from its breach is in furtherance of the public policy of this State and valid; and this position is not affected by a clause in the contract that it shall be only considered as one of suretyship. *Ibid.*

6. *Principal and Surety — Contracts — Bonds — Stipulations — Notice — Waiver—Principal and Agent.*—The surety on a builder's contract stipulating that upon the contractor's breach, written notice thereof with a verified statement of the particular facts showing such default and the date thereof shall, within thirty days after such default, be delivered to the surety at its office, etc., may waive the giving of such notice by his duly authorized agent acting within the scope of his agency or under special authority conferred, or by the surety knowingly accepting benefits thereunder. *Ibid.*

7. *Same — Benefits Retained — Consideration.*—Where there is evidence tending to show that the owner, acting through his attorney, had refused to accept a surety bond for a building contract without provision for indemnity to the laborers or materialmen, and thereafter the surety company, by its duly appointed and qualified resident assistant secretary, had issued the bond required, in consideration of the payment of a premium in double the amount theretofore charged, upon condition that checks in payment for material should be drawn jointly by the said resident secretary and the contractor, and that the surety company had several active vice-presidents, who were good business men, in the locality, and that the notice of the contractor's default required by the contract had not been given to the surety company within the time specified, but that action was delayed by the earnest solicitation of the resident secretary that the contractor be permitted to complete the contract: *Held*, sufficient of the direct or

PRINCIPAL AND SURETY—*Continued.*

implied authority of the agent of the surety company to waive the giving of the notice, and also of a waiver by the company by accepting and retaining the benefits thereof, and there being no restriction of the agent's authority in the written instrument, or that the surety company had been damaged by the delay. *Ibid.*

8. *Principal and Surety— Bonds— Indemnity— Materialmen— Laborers— Guarantor of Payment.*—An indemnifying bond given to an incorporated town or city for the erection of a building providing for the payment of "all persons who have contracts directly with the principal for labor and material," etc., includes within its intent and meaning a material account furnished to a sub-contractor under a guarantee of payment by the principal contractor, and also comes within the express terms of the written contract stipulating to "satisfy all claims and demands incurred," meaning those incurred in securing labor and material for the building. *Crane Co. v. Longest & Tessier Co.*, 346.

PRIORITIES. See Contracts, 12.

PRIVIES. See Health, 1.

PROBATE. See Constitutional Law, 2, 3; Wills, 5, 6; Appeal and Error, 47.

PROBATE OFFICER. See Husband and Wife, 6.

PROCESS. See Contempt, 1.

Process—Summons—Term—Statutes.—A summons in an action is valid though issued during a term of court, under Revisal, secs. 434 *et seq.* *Dorsey v. Kirkland*, 520.

PRODUCTION OF WILLS. See Appeal and Error, 1.

PROPERTY. See Courts, 4.

PROPERTY TAX. See Constitutional Law, 8.

PROSECUTION BOND. See Appeal and Error, 4.

PROTEST. See Taxation, 1.

PROXIMATE CAUSE. See Telegraphs, 1; Register of Deeds, 1.

PUBLIC ROADS. See Constitutional Law, 8; Statutes, 3.

PUBLIC POLICY. See Principal and Surety, 5; Courts, 4.

PURCHASE PRICE. See Auctions, 2.

PURCHASE. See Deeds and Conveyances, 4; Fraud, 3.

PURCHASER. See Estates, 5; Appeal and Error, 19; Taxation, 8; Contracts, 13; Banks and Banking, 4.

PURCHASER FOR VALUE. See Deeds and Conveyances, 11.

QUESTIONS. See Appeal and Error, 31, 32.

QUESTIONS FOR JURY. See Insurance, Fire; Evidence, 15; Larceny, 1; Physicians and Surgeons, 1; Intoxicating Liquors, 1; Homicide, 9.

QUESTIONS OF LAW. See Wills, 11; Contracts, 17.

RACE PREJUDICE. See Appeal and Error, 52.

RAILROADS. See Pleadings, 8; Contracts, 20; Instructions, 11; Evidence, 15; Carriers of Goods; Carriers of Passengers.

Railroads—Fires—Negligence—Evidence—Nonsuit—Trials.—In an action to recover damages by fire to the plaintiff's property alleged to have been negligently set out by the defendant railroad company's passing locomotive, there was evidence tending to show that the locomotive passed at 3 p. m., that the fire was discovered the following morning at 2:30; that the first of plaintiff's buildings to burn was near the foul railroad track; and in defendant's behalf, that the plaintiff's boiler-room near the center of the lands was the first to catch, and the fire was attempted to have been put out by the plaintiff's clerk who left it before it was completely extinguished, by which reason it started again and caused the damages complained of: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, including proximate cause, and a motion of nonsuit was properly denied. *Kearney v. R. R.*, 251.

RAPE. See Courts, 6; Evidence, 16.

RATIFICATION. See Constitutional Law, 5.

REALTY. See Wills, 7.

REARREST. See Homicide, 6, 7; Convicts, 1.

RECEIVERS. See Corporations, 1, 2, 3, 5, 6; Taxation, 6.

1. *Receivers—Corporations—Vendor and Purchaser—Contracts—Tender—Actions.*—Where the receiver of a corporation takes possession, without order of court, of its stock of merchandise in the hands of a purchaser, who has acquired the title and is ready, able and willing to pay the agreed price, and tenders the merchandise to the purchaser, the tender so made is unnecessary, and the only remedy of the receiver against the purchaser was to demand payment of the price, and upon refusal to sue for its recovery. The personal liability of the receiver, acting with or without the order of court, discussed by WALKER, J. *Little v. Fleishman*, 21.

2. *Receivers—Corporations—Orders—Jurisdiction—Corporate Property—Personal Liability—Courts.*—An order of the court directing the receiver of a corporation to take possession of property not belonging to the corporation exceeds its jurisdiction and will not protect the receiver acting under it. *Ibid.*

3. *Receivers—Corporations—Vendor and Purchaser—Contracts—Sales—Consideration—Actions.*—Where a receiver of a corporation has taken possession of, and sold under an order of court, a stock of goods which the corporation had previously sold and passed title to the purchaser, the purchase price remaining unpaid, the order of court and the act of the receiver thereunder was wrongful to the purchaser, destroying the subject-matter of the contract and working a failure of the consideration, and a recovery by the receiver against the purchaser for the contract price, or any part thereof, would be inequitable and unjust. *Ibid.*

RECEIVERS—*Continued.*

4. *Receivers—Corporations—Vendor and Purchaser—Tender—Wrongful Act—Motive.*—Where the receiver of a corporation has wrongfully taken possession of its stock of merchandise which the corporation had previously sold to a purchaser, the motive of the receiver cannot change the legal quality of his wrongful act. *Ibid.*

5. *Receivers—Corporation—Vendor and Purchaser—Sales in Bulk—Statutes—Waiver.*—Where the merchandise of a corporation has been sold by it in bulk without complying with the statute, Revisal, sec. 964a, and a receiver has been thereafter appointed by the court, a tender of the merchandise by the receiver to the purchaser, after the latter had refused to take them is not a waiver by the creditors of the corporation of the compliance with the statute, and an undisclosed purpose of the creditors to that effect is insufficient. *Ibid.*

6. *Receivers—Statutes—Merchandise in Bulk—Sales.*—The provision in Revisal, sec. 964a, as to sales of merchandise in bulk that the act shall not apply, among other things, to sales by receivers, etc., does not apply where a corporation has sold its merchandise in bulk before the appointment of a receiver, but only to a sale by the receiver, etc. *Ibid.*

RECKLESSNESS. See Homicide, 4.

RECONVERSION. See Wills, 10.

RECORDARI. See Justices' Courts, 3.

RECORDS. See Compromise, 2; Pleadings, 3; Appeal and Error, 38, 47; Domicile, 3; Costs, 3.

REFERENCE. See Appeal and Error, 2, 3, 4, 5, 36, 40, 41, 49.

REFUND. See Actions, 4.

REGISTER OF DEEDS.

1. *Register of Deeds—Deeds and Conveyances—Indexing—Default—Damages—Proximate Cause—Statutes.*—While the register of deeds and the surety on his official bond are liable under our statutes, Revisal, secs. 2658, 2665, 301, 3600, for his failure to index and cross-index instruments as required by law, such liability does not arise to the individuals claiming damages therefor unless the default of the register in these particulars has been the proximate cause of pecuniary injury to the claimant, and liability will not be imputed to the register of deeds when the negligence of the claimant or his agent, charged with the duty of looking after the matter, has caused or concurred in causing the injury. *Bryant Mfg. Co. v. Hester*, 609.

2. *Same—Pleadings—Admissions—Instructions—Notice—Attorney and Client.*—In an action against the register of deeds and his bondsmen for his failure to fully index and cross-index a prior registered mortgage of the timber on lands afterwards conveyed to the plaintiff, the failure of the plaintiff's title causing the damages alleged in his action to have arisen on account of moneys advanced under a contract to manufacture it, there was an admission in the answer that the indexing and cross-indexing had not been fully done, but with allegation

REGISTER OF DEEDS—*Continued.*

that the attorney of the plaintiff in investigating the title had been put upon notice of the prior registered deed by a written instrument of bargain and sale in the chain of title from plaintiff's immediate grantor, distinctly referring to the prior conveyance, and that this fact was reported to the plaintiff: *Held*, it was reversible error for the trial judge to instruct the jury that the defendant's admission of his default in fully indexing or cross-indexing the prior registered mortgage was an admission of defendant's liability, this question depending upon whether the default charged and admitted by the register of not fully indexing and cross-indexing the prior encumbrance was the proximate cause of pecuniary loss to plaintiff or whether it was due to the plaintiff's own negligent default on the facts known to him or his attorney he employed to investigate the title, or which he or his attorney should have known if reasonably attentive to his interest. *Ibid.*

3. *Register of Deeds—Deeds and Conveyances—Indexing—Default—Measure of Damages.*—The measure of damages, when recoverable, in an action against the register of deeds, for the pecuniary loss suffered by one taking a mortgage on timber standing upon lands subsequent to a mortgage on the lands, not fully indexed, and arising upon a contract to cut the timber dependent upon the title, are such damages as were probable under the facts as they existed and which can be ascertained with a reasonable degree of certainty; and it is reversible error for the trial judge to instruct the jury that they may award the difference between the sum advanced and that repaid by the other party to a contract, it not being established that such other party was insolvent or that the plaintiff could not have protected himself, at least to some extent, under the second mortgage on the timber he had taken as security, notwithstanding the prior lien of the first one. *Ibid.*

REGISTRATION. See Deeds and Conveyances, 9, 14, 15; Contracts, 12; Statutes, 4.

REINVESTMENT. See Estates, 3.

RELATIONSHIP. See Evidence, 2.

REMAINDERS. See Estates, 1, 3, 4, 5, 6, 7; Constitutional Law, 6; Wills, 13; Actions, 5.

REMAINDERMAN. See Negligence, 7.

REMARKS OF COUNSEL. See Appeal and Error, 21.

REMARRIAGE. See Wills, 14.

REMEDIES. See Election, 1.

REMOVAL OF CAUSES.

1. *Removal of Causes — Transfer of Causes — Venue — Motions — Actions Dismissed.*—An appeal will directly lie from a refusal to remove a cause because of a wrong venue, though as a general rule not from a motion to dismiss an action. *Piano Co. v. Newell*, 533.

2. *Removal of Causes—Transfer of Causes—Motions—Court's Jurisdiction —Actions—Dismissed.*—When the court has general jurisdiction of

REMOVAL OF CAUSES—*Continued.*

the subject-matter of the action a motion to dismiss for improper venue or place of trial will be denied. *Ibid.*

3. *Removal of Causes—Transfer of Causes—Conditional Sales—Personalty—Debt—Incident—Mortgages.*—In an action to recover an amount due upon a conditional sale of personal property, the security is but an incident to the cause, and the fact that the property is situated in another county than that of the venue will not alone be sufficient for a removal of the action thereto. *Ibid.*

RENTS. See Dower, 1.

RENUNCIATION. See Executors and Administrators, 3.

REPRESENTATIVES. See Contracts, 5.

REQUESTS. See Instructions, 10; Wills, 17.

RES GESTÆ. See Insurance, Fire, 1; Murder, 1.

RES INTER ALIOS. See Evidence, 12.

RESIDENCE. See Domicile, 1.

RES JUDICATA. See Attachment, 4.

RESTRAINT ON ALIENATION. See Wills, 1, 15; Trusts and Trustees, 2.

REVISAL.

SEC.

11. Renunciation of some of next of kin in equal degree does not affect right of the others to letters of administration. *In re Jones*, 337.

16 (2) (3). The actual occupancy as well as the intent is necessary to effect a change of domicile, and letters of administration issued by the clerk otherwise may be collaterally attacked. Defendant in damage suit is a party in interest. *Reynolds v. Cotton Mills*, 412.

301. Register of deeds is not liable for default to properly indexed deed unless proximate and loss solely attributable to him. *Mfg. Co. v. Hester*, 609.

407. Wife need not prosecute or defend action concerning her lands by guardian or next friend. *Craddock v. Brinkley*, 125.

434. Summons issued during term is valid. *Dorsey v. Kirkland*, 520.

483. The plea of intervening negligence of plaintiff's employee is one of contributory negligence, required to be pleaded. *Kearney v. R. R.*, 251.

563. Joinder of husband in action against his wife is unnecessary; makes him her agent, and his consent to judgment against her is voidable. *Craddock v. Brinkley*, 125.

528. Governor a proper party to enforce State Tax Commission to comply with cotton Warehouse Act. *Bickett v. Tax Commission*, 433.

608. The appellee's right to docket and dismiss justice's judgment under this section, when sent up to proper term, is optional. *Barnes v. Saleeby*, 256.

REVISAL—*Continued.*

SEC.

866. Plaintiff may examine before trial defendant in action for damages for personal injuries upon allegation that defendant has exact knowledge of the facts. *Smith v. Wooding*, 546.

937. Common law permitting rearrest of convicts not changed by statute. *S. v. Finch*, 599.

939-40. Willful disobedience of order of court to desist from obstructing improvement of highway is not contempt in court's presence, is appealable; but disavowal of disrespectful intent will not purge the party of contempt. *Waldo v. Wilson*, 463.

962. Under allegation and evidence, the jury must find whether a debtor, when making a gift, retained property sufficient to pay his debts, etc. *Garland v. Arrowood*, 371.

946. Under the facts of this case a conditional fee is converted into a fee simple, Revisal, 1578. *Sharpe v. Brown*, 294.

964a. Section does not apply when merchandise in bulk is sold before appointment of receiver. *Little v. Fleishman*, 21.

976. When complied with, party against whom relief is sought "is party to be charged," and may be bound, though other party may not be. *Lewis v. Murray*, 17.

980. Notice of prior unregistered deed does not supply registration since 1 December, 1885. *Lanier v. Lumber Co.*, 200.

982-3 (Pell's). Against creditors, conditional sales, reserving title, must be in writing and registered, and trustee is a purchaser for value, and objection that present consideration for debt is necessary is untenable. *Starr v. Wharton*, 323.

784. The effect of judgment upon property held in *custodia legis* is of *venditis exponas* thereon. *Mfg. Co. v. Lumber Co.*, 404.

998. The question of validity to the probate of a deed will not be considered on appeal when the probate, etc., does not appear of record. *Dorsey v. Kirkland*, 520.

1376. Sheriff may not set off amounts claimed as due him for previous years in settlement of current taxes. *Comrs. v. Hall*, 490.

1384. When it is unnecessary to comply with this section to recover taxes paid under protest under an unconstitutional statute. *R. R. v. Cherokee County*, 86.

1510. Appellant from justice's court should have case docketed at next term of Superior Court, though not held for absence of judge, and it will go over to subsequent term. *Barnes v. Saleeby*, 256.

1510. Sheriff may adjourn court from day to day for four days for arrival of presiding judge, and certainly under his orders. *S. v. Harden*, 580.

1556. Widow is not "heir" to husband at common law, and by statute, Rule 8, where husband has not devised the property, and it cannot descend to her heirs at the time of her death when there are no heirs

REVISAL—*Continued.*

SEC.

at law of her husband, contrary to the terms of his will. *Grantham v. Jinnette*, 228.

1578. Devise to A. and to "heirs of her body, if she has any," and over upon non-happening of the contingency, the conditional fee, an estate tail, is converted into a fee-simple title under the facts of this case. *Sharpe v. Brown*, 294.

1581. Statutes supersedes common-law doctrine that a limitation contingent upon death and an indefinite failure of issue is void for remoteness. *Patterson v. McCormick*, 448.

1590 (Pell's). Courts may now decree sale of vested interests in lands contingent to persons not in being, or when contingency upon which the remaindermen is determined has not happened. Action started by the holder of present vested interest. Status of contingent interest not destroyed. Subsequent action under changed condition not estopped. Purchaser cannot except that judgment is inequitable to life interest. *Dawson v. Wood*, 158.

1631. Testimony of beneficiaries that will was found after testator's death is not a transaction of communication forbidden by this section. *Patillo v. Mfg. Co.*, 156.

1631. Officers of a bank ordinarily have no such interest in an action wherein the bank is a party to disqualify them. *In re Gorham*, 271.

1631. Officer of a corporation not disqualified as to transactions, etc., with deceased officer of another corporation in action between the corporations. *Bank v. Wysong & Miles Co.*, 284.

1669. Possession under junior State's ground of lands is not "color." *Land Co. v. Wooten*, 248.

2107. Married woman may claim personal property exemption from assets of partnership with her husband. *Grocery Co. v. Bails*, 298.

2107. As to whether probate officer complied with this section and omitted it from certificate by mistake, she may testify in rebuttal what actually occurred. Husband's heirs at law must show written contract to recover for improvements and compliance with this section. *Anderson v. Anderson*, 401.

2118. The failure of wife to file certificate and display sign when in partnership with her husband does not deprive her of her rights to exemptions. *Grocery Co. v. Bails*, 298.

2658. Register of deeds not liable for register's failure to properly index unless the default is proximate and the other party is free from negligence. *Mfg. Co. v. Hester*, 609.

2665. Register of deeds not liable for default to properly index deeds unless proximate and loss solely attributable to him. *Ibid.*

2817. Common law permitting rearrest of convicts not changed by statute. *S. v. Finch*, 599.

REVISAL—*Continued.*

SEC.

2879. Under this and section 2862, the rights to sell lands in receiver's hands is cumulative, not depriving owner to tender payment of taxes due to save himself from loss. *Headman v. Comrs.*, 261.

2855. When taxes paid under an unconstitutional statute under protest, and this section complied with, it is unnecessary to comply with Revisal, 1384.

2894. Listing lands sufficiently described will not invalid sheriff's deed because not listed in name of true owner. *Headman v. Comrs.*, 261.

2899. The remedy given to county to foreclose for nonpayment of taxes is in addition to those of section 2912, as amended by statute. *Ibid.*

2905. See reference to sections 2912, 2899.

2912. This is additional remedy for county to foreclose under this section, to that to receive deed direct from sheriff, section 2899 *et seq.*, amended by Laws of 1901 (Pell's Revisal, sec. 2905), and the latter is not precluded by the former. *Headman v. Comrs.*, 261.

3088. Heir a proper and necessary party in proceedings to lay off dower. *Ingram v. Corbit*, 318.

3124. Petition before clerk, alleging withholding of later will for fraudulent purposes, comes within this section, which, without answer or evidence *per contra*, raises no issues for transfer to trial docket. An appeal will lie when judge sustains clerk's erroneous refusal to dismiss. *Williams v. Bailey*, 37.

3133. Appearance and examination of witnesses in this State not now necessary when section is complied with and will properly probated in a sister State. *Vaught v. Williams*, 77.

3176. Common law permitting rearrest of convicts not changed by statute. *S. v. Finch*, 599.

3600. Register of deed is not liable for default to properly index deed unless proximate and loss solely attributable to him. *Mfg. Co. v. Hester*, 609.

3632. Defendant willingly entering into a fight, and by the reckless use of a gun kills a third person, may be held guilty of manslaughter, the plea of self-defense not being available. *S. v. Coble*, 588.

3701. One willfully and knowingly disobeying order of lawful officer to assist in making an arrest is guilty of a misdemeanor. *S. v. Ditmore*, 592.

4755. Fire insurance agent's report made after inspection of loss as to amount is competent. *Queen v. Dixie Life Ins. Co.*, 33.

4809. Indemnity contracts within meaning of this section, and time limited for action therein applies. *Lumber Co. v. Johnson*, 44.

5246. State Auditor or sheriff may not set off amounts claimed due by sheriff from former settlement of taxes. *Comrs. v. Hall*, 490.

REVISAL—*Continued.*

SEC.

5407. Officer may rearrest a convict who has escaped from him, without new warrant, in any county in the State. *S. v. Finch*, 599.

5261. Sheriff may not offset in present settlement for taxes amounts claimed to be due in making former ones. *Comrs. v. Hall*, 490.

RIGHTS. See Easements, 1.

ROADS AND HIGHWAYS. See Constitutional Law, 13, 14.

RULE IN SHELLEY'S CASE. See Wills, 13.

RULES OF COURT. See Appeal and Error, 25, 54; Costs, 4.

RULES. See Wills, 3.

RULES OF PROPERTY. See Deeds and Conveyances, 3; Estates, 10.

SAFE APPLIANCES. See Master and Servant, 1.

SAFE PLACE TO WORK. See Master and Servant, 2.

SALES. See Receivers, 3, 6; Vendor and Purchaser, 1; Wills, 7, 9; Estates, 1, 3, 7; Constitutional Law, 6; Municipal Corporations, 9; Taxation, 8; Courts, 2; Judgments, 9; Dower, 1.

SALES IN BULK. See Receivers, 5.

SCHOOLS. See Taxation, 3.

1. *Schools— Statutes— Trustees— Discretionary Powers — Courts — Mandamus.*—Where the act creating a school district for an incorporated town gives the school trustees exclusive control of the public schools therein with full power to prescribe rules and regulations relating thereto, the judgment of the trustees in the exercise of the power so conferred is upon matters within their discretion, and will not be disturbed by the courts in the absence of evidence that they have acted arbitrarily or in abuse thereof; and mandamus will only lie when no discretion is vested in the trustees to compel them to perform a specific ministerial duty imposed by law. *Dula v. School Trustees*, 426.

2. *Same—Health.*—In an action for a mandamus to compel the school trustees of a town to continue a term of the public schools therein to the end of a prescribed or contemplated term in May, it appeared that they had closed the school about the middle of the term, acting upon information that it was to the best interest of the health of the town to close for a while during an epidemic of influenza, and that thereafter the remaining part of the term was insufficient to permit the various grades to be benefited in qualifying themselves for the higher grades, etc. The lower court having held that the trustees acted in good faith, without abuse of the statutory powers conferred upon them, it is *held*, on appeal, that they acted within the exercise of their proper discretion, and their action will not be inquired into or disturbed by the courts. *Ibid.*

SEALS. See Executors and Administrators, 1, 2; Pleadings, 3.

SEISIN. See Deeds and Conveyances, 4, 6.

SELF-DEFENSE. See Homicide, 4, 5, 6, 9.

SENTENCE. See Intoxicating Liquors, 9, 10.

SEPARATE WRITINGS. See Wills, 20.

SEQUESTRATION. See Indemnity, 1.

SETOFF. See Taxation, 9.

SETTLEMENT OF CASE. See Appeal and Error, 26.

SHAREHOLDERS. See Corporations, 6; Evidence, 11.

SHARES OF STOCK. See Banks and Banking, 1.

SHERIFFS. See Taxation, 9; Courts, 5, 7, 8; Criminal Law, 5; Arrests, 1.

SIGNATURE. See Wills, 16, 17.

SIGNS. See Married Women, 1.

SLANDER.

1. *Slander—Corporations—Officers.*—A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. *Cotton v. Fisheries Co.*, 56.

2. *Same — Joint Torts — Actions — Parties.*—Where slanderous words uttered by an officer or agent of a corporation are actionable both as against the corporation and its agent uttering them, both the corporation and its agent may be joined as parties in a single action. *Ibid.*

3. *Slander—Moral Turpitude—Actionable Per Se.*—Slanderous words are actionable *per se* when they impute to another the commission of a crime that involves moral turpitude; and it is not required that they be in express terms, for the significance of the utterance may be determined by the words themselves in view of attendant circumstances, the tones, gestures and the accompanying acts of the parties, etc., and their reasonable effect, by fair intendment, upon the apprehension of the listeners. *Ibid.*

4. *Slander—Corporations—Officers—Actionable Per Se— Actions— Parties —Joint Torts.*—Where the complaint in an action for slander against a corporation and its officers or employees alleges, in effect, that the plaintiff's goods were being sent by him to another town, when the general manager of the company, acting under the direction of its president, unpacked and searched them, stating in the presence of several onlookers that the corporation had lost certain personal property while the plaintiff was its manager, for which the search was being made and which the president of the corporation suspected the plaintiff of having taken, with further allegation that the words used intended to charge the plaintiff with having feloniously appropriated them: *Held*, the alleged language of the defendant corporation's general manager, taken in connection with his accompanying acts in causing the plaintiff's goods to be publicly opened and searched, under

SLANDER—*Continued.*

the direction of its president, amounted to an accusation of larceny, actionable *per se*, and the company and its officers were properly joined in the one action. *Ibid.*

SPARK ARRESTERS. See Instructions, 11.

SPECIAL LAWS. See Taxation, 2.

SPECIAL PURPOSES. See Constitutional Law, 13, 15.

SPECIAL REQUESTS. See Instructions, 4.

SPECIAL TAX. See Constitutional Law, 8.

SPECIAL VENIRE. See Courts, 6.

SPECIFIC PERFORMANCE. See Statutes of Fraud, 1; Contracts, 1, 3, 21.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STARE DECISIS. See Courts, 3; Estates, 10.

STATE AGENCIES. See Constitutional Law, 12.

STATE BOARD OF AGRICULTURE. See Parties, 3.

STATE TREASURER. See Actions, 4.

STATE WAREHOUSE SUPERINTENDENT. See Parties, 3.

STATE'S LANDS.

State's Lands—Grants—Junior Grants—Possession—Color of Title—Statutes.—Possession of State's land under a junior grant made since 1893 confers no rights upon the grantee or grantees therein, nor does such junior grant constitute color of title. Revisal, sec. 1699. *Land Co. v. Wooten*, 248.

STATIONS. See Carriers of Passengers, 1; Instructions, 6, 8.

STATUTES. See Cities and Towns, 1; Courts, 3, 7, 8; Contempt, 1; Ejection, 1; Contracts, 12; Executors and Administrators, 3; Domicile, 1; Fraudulent Conveyances, 1; Schools, 1; Usury, 1; Parties, 3; Attachment, 2; Insurance, Fire, 1; Process, 1; Municipal Corporations, 1, 2, 5, 7; Constitutional Law, 1, 8, 9, 11, 12, 14, 15, 16, 17; Receivers, 5, 6; Appeal and Error, 1, 42; Negligence, 1, 10; Deeds and Conveyances, 1; Actions, 3, 4, 5, 6; Justices' Courts, 2; Estates, 8, 9; Married Women, 1; Principal and Surety, 4; Instructions, 5, 8; Constitutional Law, 2, 3, 4, 5, 6, 7; Wills, 2, 5, 11, 12, 17; Taxation, 1, 2, 5, 6, 8, 10; Husband and Wife, 1, 2, 6, 9; State's Lands, 1; Evidence, 5, 9, 11; Estates, 1, 3, 4, 5, 6; Judgments, 3; Costs, 4; Pleadings, 4, 8, 12; Election, 2; Partnership, 1; Arrest, 1; Register of Deeds, 1.

1. *Statutes—Municipal Corporations—Cities and Towns—Water Pipes—Assessments—Notice.*—Construing section 6, chapter 12, Laws of 1917, with other relevant sections of the act, especially sections 4 and 5, it is *held* that the provision for notice of assessment to be given by the town of Canton is not confined to the improvement of its streets alone, but includes the laying, etc., of its water pipes. *Felmet v. Canton*, 53.

STATUTES—*Continued.*

2. *Statutes—Amendments—Constitutional Law—Bond Issues—Taxation—Counties.*—Where the constitutional requirement that an act providing for the creation of a county debt and the levy of a tax, etc., shall be passed upon its various readings on separate days, with the "aye" and "no" vote taken, has been complied with by the Legislature, an amendment, which had not met this requirement but which does not increase the amount of the debt or the taxes to be levied or otherwise materially change the original bill, is also valid and constitutes a portion of the law without the observance of these formalities. *Wagstaff v. Highway Commission*, 354.

3. *Same—Highways—Public Roads.*—Where an act submitting the question of bonds for the construction and maintenance of the public highways of a county to the qualified voters therein has been passed on the several days with "aye" and "no" vote taken, as required by the Constitution, Art. II, sec. 14, stating that the highway commissioners of the county shall retire the bonds at certain intervals within a period of forty years, but expressly leaving this discretionary with them within the forty years, and subsequently, but before the issuance of the bonds, the act was amended by the Legislature without observing these provisions of the Constitution, making the interest on the bonds payable semi-annually instead of on 1 July and January of each year, and leaving it absolutely discretionary with the said commissioners to determine the maturity of the bonds in series within the forty years: *Held*, the amendment did not change the material portions of the original bill, which met the constitutional requirements, and the amendment should be incorporated therein as a valid law. *Ibid.*

4. *Statutes—Counties—Bonds—"New Registration."*—The provisions of a statute authorizing a county to issue bonds for highway purposes, with the approval of its voters, that "no new registration shall be required," is not a prohibition on the power of the county to order a new registration, but a statement that it shall not be necessary. *Guire v. Comrs.*, 517.

5. *Statutes—Interpretation—Repealing Statutes—Drainage District—Department of Agriculture—Moneys Advanced.*—Section 1, chapter 235, Public Laws of 1915, by repealing section 14, chapter 67, Public Laws of 1911, amendatory of chapter 442, Public Laws of 1909, providing, among other things, for advancing moneys to the credit of the Department of Agriculture in the State Treasury to a drainage district formed under the acts, for compensation, etc., of the drainage surveyor, and its refund out of the future sale of the bonds to be issued by the drainage district, etc., construed with section 2 of chapter 235, Public Laws of 1915, requiring the Attorney-General, at the request of the Department of Agriculture, to bring action against the commissioners of any such drainage district and the bond of the petitioners for the district (sec. 2, ch. 442, Laws of 1909) that has failed to refund the money so advanced cannot be construed, by correct interpretation, to relieve a district formed under the statutes from refunding the money advanced, as provided by said section 14, chapter 67, Public Laws of 1911, before the enactment of the Laws of 1915, from the proceeds of the sale of the drainage bonds thereafter issued. *Board of Agriculture v. Drainage District*, 222.

STATUTES—*Continued.*

6. *Same—Primary and Secondary Liability.*—The liability of a drainage district to refund the moneys advanced by the State Treasurer to the credit of the State Board of Agriculture (sec. 14, ch. 67, Public Laws of 1911) for compensation, etc., of the drainage surveyor is primary and is not affected by the fact that the statute provides that suit may also be brought against the bond of the petitioners for the district. Sec. 2, ch. 442, Public Laws of 1909. *Ibid.*

STATUTE OF FRAUDS. See Landlord and Tenant, 1; Appeal and Error, 28; Leases, 1; Pleadings, 10.

Statute of Frauds—Lands—Contracts to Convey—Specific Performance—Vendor and Purchaser—Equity.—Under our statute (Revisal, sec. 976), requiring, among other things, that a contract to convey lands shall be void unless it, or some note or memorandum thereof, shall be put in writing and signed by the party charged, etc., the "party to be charged" is the one against whom relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the other could not be held, because as to them the statute of frauds is not fully complied with. *Lewis v. Murray*, 17.

STENOGRAPHER'S NOTES. See Trials, 3.

STREETS. See Municipal Corporations, 1, 2, 4, 6, 7; Constitutional Law, 1.

SUBSTITUTION. See Contracts, 20.

SUITS. See Actions, 5.

SUMMONS. See Process.

SUPREME COURT. See Appeal and Error, 14; Actions, 4.

Supreme Court—Decisions—Facts.—In applying a former decision of the Supreme Court to the facts of a present case, the law will be as declared upon the facts stated by the Court in the decision referred to, in the absence of any correction of the alleged mistake by petition to rehear. *Underwood v. Ins. Co.*, 328.

TAXATION. See Municipal Corporations, 5; Constitutional Law, 5, 10, 12, 13, 15, 16, 17; Statutes, 2.

1. *Taxation—Payment—Protest—Statutes—Actions—Demand.*—Where a taxpayer has paid his taxes authorized by an unconstitutional statute, under protest, and has complied with the provisions of Revisal, sec. 2855, which regulates and controls actions to recover illegal taxes paid under protest, it is unnecessary to the maintenance of his action to recover them that he follow the provisions of section 1384, requiring that he present his claim and make his demand, etc. *R. R. v. Cherokee County*, 87.

2. *Taxation—Constitutional Law—Statutes—Limitation—General Laws—Special Laws.*—Under the provisions of our Constitution, art. 5, sec. 1, it is commanded that the poll tax shall always be equal to that on $300 valuation on property, and that it shall not exceed $2 upon the poll, and a statute which authorizes any county to levy a tax in excess of this constitutional limitation for general expenses, though called a "special" tax in the act, is unconstitutional and invalid. *Ibid.*

TAXATION—*Continued.*

3. *Same—Schools.*—Section 9, chapter 33, Laws of 1913, being a part of an act "to provide for a six-months school term in every public school district of the State," but authorizing a tax in every county in the State for ordinary expenses, without enumerating them, is coextensive with the legislative power, as to the territory, people or property to be taxed, and the purpose is general, and not a special one, within the meaning of art. 5, sec. 1 thereof. *Ibid.*

4. *Taxation — Pleadings — Payment — Evidence.*—It is only required that the payment of taxes be *shown* before plaintiff can recover in his suit to remove a tax deed as a cloud upon his title to lands, and it is unnecessary that such payment be *pleaded*. *Headman v. Comrs.*, 261.

5. *Taxation— Lands— Description — Listing — Owner -- Statutes.*—Where lands have been sufficiently described in listing them for taxation, the fact that they were not listed in the name of the true owner will not invalidate the sheriff's deed when the listing is otherwise sufficient. Revisal, sec. 2894. *Ibid.*

6. *Taxation— Receivers— Deeds and Conveyances— Tax Deeds— Municipalities— Foreclosure— Rights and Remedies— Statutes.*—The statutory right to sell lands in a receiver's hands is cumulative to that given the sheriff against the owner, and the latter is not deprived of his right to pay or tender payment of the taxes due where it is necessary to protect himself against loss. Revisal, secs. 2879, 2862. *Ibid.*

7. *Same—Parties—Cloud on Title—Equity.*—In a suit by the owner of lands in a receiver's hands to remove a tax deed as a cloud upon his title, the receiver should be made a party under the direction of the court which has appointed him, as the assets in his hand are involved, and may be impaired in the event that the tax deed be eventually declared valid. *Ibid.*

8. *Taxation— Sales — Purchasers — Municipal Corporations — Counties— Foreclosure — Deeds and Conveyances — Statutes.*—The right of a county or municipality to become purchasers at their sales of lands for the nonpayment of taxes depends upon the statutes in force at the time, and the right given them to foreclose under the provisions of Revisal, sec. 2912, is an additional remedy to that of receiving a deed direct from the sheriff, Revisal, secs. 2899 *et seq.*, amended by ch. 558, sec. 18, Laws of 1901 (Pell's Revisal, sec. 2905), and when the latter course has been followed, objection that the only method was by foreclosure is untenable. *Ibid.*

9. *Taxation—Sheriffs—Setoff—Counterclaim.*—The obligation of the sheriff to settle for the county taxes collected by him in accordance with "the list of taxables" furnished him, or of the taxpayer, does not rest upon contract or consent, and is not a debt in the ordinary sense, but a charge imposed by the Legislature or under its authority for the collection of moneys for immediate public purposes, permitting no offset or counterclaim by the sheriff claiming over-payment in his settlement for previous years, in an action to recover the amount due by him in accordance with the list furnished him for the current year. *Comrs. v. Hall*, 490.

10. *Same—Statutes.*—The State Auditor is permitted, under our statutes, Rev., secs. 5246, 5261, to make deduction of over-payment in the set-

TAXATION—*Continued.*

tlement for taxes collected when there is error in the "clerk's abstract of taxables," and the sheriff is "charged with more than the true amount," etc., and though the same deductions and corrections are permitted the county in making settlement under Revisal, sec. 1376, these statutes are inapplicable when the credits claimed are not from either of these causes; and to allow them otherwise would be to permit an offset or counterclaim, which is not permissible. *Ibid.*

TAX DEEDS. See Taxation, 6.

TAX DISTRICTS. See Municipal Corporations, 7.

TAXES. See Municipal Corporations, 9.

TELEGRAPHS.

Telegraphs—Commerce—Interstate Messages—Mental Anguish—Damages—Personal Injuries—Proximate Cause—Speculative Damages—Nominal Damages.—A recovery of damages for mental anguish alone may not be had on an interstate telegram announcing a death; and where a delay therein by the company has caused the sendee to miss a regular passenger train and he has obtained permission to ride on a caboose car of a freight, from which ride he has received personal injury, and also such injury from fatigue in walking from the nearest railroad station to his destination, upon the failure of being met by an automobile and his unwillingness to pay the price charged for hiring one, the failure to deliver the telegram in time is not the proximate cause of the physical injuries thus received, and they are also too speculative and remote, and nominal damages only are allowable. *Johnson v. Telegraph Co.*, 31.

TENANTS. See Estates, 7.

TENANTS IN COMMON. See Evidence, 3; Deeds and Conveyances, 2; Judgments, 5.

TENDER. See Trials, 1, 4; Municipal Corporations, 9.

TERMS. See Clerks of Court, 1; Justices' Courts, 1, 2, 4; Process, 1; Courts, 5, 8.

TIMBER. See Vendor and Purchaser, 2; Contracts, 4; Fires, 2.

TIME EXTENDED. See Appeal and Error, 26.

TITLE. See Deeds and Conveyances, 1, 4, 6, 7, 14; Vendor and Purchaser, 1; Evidence, 2; Limitation of Actions, 1; Fraud, 2; Actions, 2; Judgments, 5; Trusts and Trustees, 1.

TOOLS AND APPLIANCES. See Master and Servant, 2.

TRADES. See Constitutional Law, 10.

TRADITIONS. See Evidence, 2.

TRANSACTIONS. See Murder, 2.

TRANSACTIONS AND COMMUNICATIONS. See Evidence, 9.

TRANSCRIPT. See Costs, 2.

TRANSFER. See Contracts, 20.

TRANSFER OF CAUSES. See Removal of Causes, 1, 2, 3.

TREATMENT. See Physicians and Surgeons, 1.

TREATY. See Pleadings, 5.

TRIALS. See Courts, 5, 7; Larceny, 1; Appeal and Error, 52, 53; Evidence, 6, 15; Intoxicating Liquors, 1, 5; Negligence, 1, 7, 8, 9, 10; Railroads, 1; Claim and Delivery, 1; Master and Servant, 3; Homicide, 3; Carriers of Goods, 1; Indictment, 2, 3; Fraudulent Conveyances, 1; Contracts, 17; Common Law, 1; Physicians and Surgeons, 1.

1. *Trials—Opinion of Judge—Appeal and Error—Harmless Error.*—A remark of the trial judge, in the presence of the jury, upon the argument of counsel, as to the sufficiency of the evidence is not objectionable as an expression of his opinion, and if otherwise it is without prejudice when it appears that he did not finally adopt his first impression, and sufficiently instructed the jury as to the law. *Alexander v. Cedar Works*, 138.

2. *Trials— Counsel— Arguments— Instructions.*—A remark of counsel in his address to the jury will not be considered, on appeal, as such a flagrant abuse of his privilege as to warrant a new trial, when it appears that the jury doubtless passed it by without prejudice as being merely a too fervid utterance in the heat of debate, and the judge's charge was sufficient to prevent an injurious effect upon the adversary party. *Bradley v. Camp Mfg. Co.*, 153.

3. *Trials — Argument — Stenographer's Notes -- Evidence.*—The solicitor, upon the trial of a homicide, may read the transcript of the evidence made by the official stenographer in the case appointed under the provision of the statute in contrasting the evidence of the State with that of the defendant and arguing to the jury inferences therefrom, and an objection on the ground that the cross-examination of witnesses had not been typewritten is untenable. *S. v. Evans*, 564.

TRUSTS. See Wills, 14; Limitation of Actions, 4.

Trusts—Husband and Wife—Parol Trusts—Evidence—Quantum of Proof —Burden of Proof—Debt—Parties—Executors and Administrators.— Where the husband, or those claiming under him, seeks to set up a parol trust in the wife's land in his favor, it is necessary to show the trust by "clear and convincing" evidence, though a preponderance thereof only is necessary where the husband has since died and the action is brought by his administrator, a necessary party, to recover money which the deceased husband has paid to his own use. *Anderson v. Anderson*, 401.

TRUSTS AND TRUSTEES. See Corporations, 4; Deeds and Conveyances, 12; Contracts, 13.

1. *Trusts and Trustees—Title—Merger.*—Where the beneficiary of a trust estate in lands is also designated by the donor as the trustee for his own benefit, especially where there is no pecuniary interest of the beneficiary to be protected and no estate on contingency to be preserved, the equitable interest merges into the legal title and the title becomes a fee simple absolute one. *Odom v. Morgan*, 367.

TRUSTS AND TRUSTEES—*Continued.*

2. *Same—Repugnancy—Restraint on Alienation.*—While the doctrine of merger will ordinarily be prevented or not as the intent of the donor may appear from the expressions he has used in a written instrument under which the question has arisen, this will not apply where the donor has conveyed the legal title of lands to the donee to be held in trust for his own benefit, that is, the legal and equitable title to one and the same person, and his intent that there should be no merger may only be gathered from and is solely dependent on a further provision in the instrument that the title should be held for a term of years upon a condition repugnant to the legal title conveyed, and which is an unenforcible restraint upon the alienation of the lands. *Ibid.*

3. *Same—Power of Appointment.*—A devise of the bulk of the testator's property, including the lands in controversy, to his wife in trust for ten years, also designating her the trustee, to be managed for her benefit as the testator would have done, and to become hers at the end of the time, conferring upon the wife the power to designate a successor in the trusteeship, by will, and she, before her death, accordingly designates her grandson to hold the lands in trust for himself and certain named relatives, to manage the property in their behalf as an "active trust," with full power to dispose of the same or any part thereof and hold the proceeds subject to the trust: *Held*, a conveyance made of the lands embraced in the trust by the wife's grandson, in conformity with her will, of the fee-simple title, is valid to pass the title conveyed by him. *Ibid.*

UNIVERSITY OF NORTH CAROLINA. See Wills, 11.

USURY. See Evidence, 10.

1. *Usury—Counterclaim—Issues—Instructions—Verdict Directing—Appeal and Error.*—The debtor may set up the defense of usury in the creditor's action to recover the debt, and an instruction therein that the jury find the issues for the plaintiff if they believe the evidence, without submitting an issue tendered as to the counterclaim, is a denial of this right, when pleaded with supporting evidence, and constitutes reversible error. *Carey v. Hooker*, 171 N. C., 229, and other like cases, cited and distinguished. *Noland v. Osborne*, 15.

2. *Usury—Banks and Banking—Deposits.*—Where a bank has contracted with a borrower that in consideration of the loan the latter should keep a certain sum of the money deposited in the bank, beyond his control, and charges and receives in advance the full rate of interest on the entire amount, the transaction is an usurious one. *Bank v. Wysong & Miles Co.*, 380.

3. *Usury.*—The elements of usury are defined to be a loan or forbearance of money, either express or implied, upon an understanding that the principal shall or may be returned, and a greater profit than is authorized by law shall be paid, where the transaction is entered into with the intent to violate the law, which intent may be implied if all the other elements of usury are expressed upon the face of the instrument or established by sufficient evidence. *Ibid.*

4. *Usury—Pleadings—Counterclaim—Banks and Banking—National Law—Interpretation—Courts—Federal Courts—Statutes.*—While the

USURY—*Continued.*

State court has concurrent jurisdiction with the Federal court in an action brought upon a note by a national bank, and also of the question of usury involved in the transaction, if any, the pleading and procedure required expressly by the Federal statute, as interpreted by the decisions of the Supreme Court of the United States, to recover the penalty must be followed, and the interpretation of the statute by that Court will prevail over a contrary one by the State court, and over a State statute relating to the subject; and, therefore, where usurious interest has been actually received by a national bank for a loan, it is required that the maker of the note bring an independent action to recover double the amount of the interest paid and received, which is allowed by the statute as a penalty, and the penalty may not be set up as a counterclaim in the action brought by the national bank in the State court to recover on the note. *Ibid.*

VALUES. See Banks and Banking, 1.

VENDOR AND PURCHASER. See Statute of Frauds, 1; Contracts, 1, 2; Receivers, 1, 3, 4; Appeal and Error, 2; Evidence, 18; Contracts, 5; Homicide, 1, 2.

1. *Vendor and Purchaser—Sales—Title—Contracts.—Semble,* where a corporation has sold and delivered its stock of goods, and the contract has been fully performed with the exception of the payment of the agreed purchase price, which the purchaser was ready, willing and able to do, but refused to do so upon the appointment of a receiver, the title to the merchandise passed to the purchaser from the corporation. *Little v. Fleishman,* 22.

2. *Vendor and Purchaser—Contracts— Breach— Damages— Profits— Timber.*—Where the purchaser of standing timber, to be paid for by stumpage as it was being cut, has cut the timber from the lands, excepting a certain more valuable part, and as to this he had made preparation and incurred expense, when he was estopped by the vendor's breach of contract, he may recover the profits he would have made on the uncut timber which are ascertainable with reasonable accuracy, including the expense, etc., incurred. *Dorsey v. Mining Co.,* 61.

3. *Vendor and Purchaser—Contracts—Consideration—Cash Deposits—Actions.*—A cash deposit made upon a contract for the purchase of several automobiles, subject to the vendor's approval, materially altered by him, and rejected as changed by the purchaser is without consideration and may be recovered by the latter in his action. *Harvell v. Auto Co.,* 29.

VENUE. See Removal of Causes, 1.

VERDICT. See Appeal and Error, 10, 11, 23, 44, 51; Evidence, 10.

1. *Verdict — Interpretation — Evidence — Instructions.*—The verdict of a jury must be interpreted on appeal and allowed significance by proper reference to the testimony in the case and the judge's charge thereon. *Weldon v. R. R.,* 179.

VERDICT—*Continued.*

2. *Same—Negligence—Contributory Negligence—Assumption of Risks.*—Where the verdict of the jury, under conflicting evidence and a correct charge upon the issues of negligence and contributory negligence, establishes the fact that the death of plaintiff's intestate, a flagman on defendant railroad company's freight train, was caused by his being thrown from the steps of the caboose car, while he was engaged in his duties, to his death by the violent, sudden and unusual movement of the train, the element of assumption of risks is eliminated and an exception that the charge erroneously confined the scope of the inquiry thereon is untenable on appeal. *Ibid.*

3. *Verdict—Evidence—Lands—Dividing Lines—Boundaries.*—Where the jury has disregarded the contentions of the parties in locating the true divisional line in dispute between the lands of adjoining owners, and has established the line between those claimed, evidence that the acreage exceeded that called for in the deeds of each of the parties, that allowances should be made for variation in the compass, and that the distances were greater than given in these deeds is held sufficient. *Nall v. McMath*, 183.

4. *Verdict—Compromise—Evidence—Appeal and Error.*—A compromise verdict arbitrarily rendered and not supported by any legal evidence will be set aside. *Ibid.*

VERDICT DIRECTING. See Usury, 4.

VERDICT SET ASIDE. See Appeal and Error, 9, 10, 37.

VESTED INTERESTS. See Estates, 10.

WAITERS. See Contracts, 10.

WAITING-ROOMS. See Carriers of Passengers, 1; Instructions, 5, 8.

WAIVER. See Receivers, 5; Principal and Surety, 6; Municipal Corporations, 9; Insurance, Life, 3; Contracts, 20.

1. *Waiver—Intent—Knowledge—Burden of Proof—Evidence.*—Where there is evidence tending to show that the vendor, furnishing sash for a building, sent them to the vendee for the latter to examine to see if they were all right for the purpose, and after the former had made changes in accordance with suggestions the latter accepted and used them, it is sufficient for the jury to find that the intent of the vendee was to waive any defects therein, with knowledge thereof, the burden of proof being on the plaintiff to show an acceptance unless there had been a concealment of the defects by the defendant, in which case the burden would be upon the defendant. *Mfg. Co. v. Bldg. Co.*, 104.

2. *Waiver—Definition—Estoppel.*—The doctrine of waiver applies where a person knowingly and intentionally dispenses with the performance of an obligation owed by another to him, either expressly or impliedly, and while the doctrine of estoppel has a fundamental relationship to it, it is distinguishable in several of its features, as explained in the opinion. *Ibid.*

WARRANTY. See Deeds and Conveyances, 4, 7; Fraud, 3.

WATER PIPES. See Municipal Corporations, 7, 8.

WEIGHT OF EVIDENCE. See Courts, 1.

WIDOWS. See Dower, 1; Wills, 14; Parties, 1, 2.

WIFE'S SEPARATE PROPERTY. See Husband and Wife, 3, 7; Pleadings, 7; Constitutional Law, 7.

WILLS. See Appeal and Error, 1; Executors and Administrators, 1, 2; Pleadings, 3; Constitutional Law, 2, 3; Estates, 9; Easements, 1; Evidence, 5, 6.

1. *Wills — Devise — Fee Simple — Restraint on Alienation.*—A devise of lands to the testator's named children, for division, with provision they are not to sell any of the lands except to each other, it being his "desire that the lands shall descend to my grandchildren": *Held*, the testator's "desire that the land should descend to his grandchildren" was merely the expression of his wish, and not a legal limitation of the devise; but were it otherwise, the devise would be to the children in fee simple, with a void restraint upon alienation. *Brooks v. Griffin*, 7.

2. *Wills—Production of Wills—Statutes.*—A petition before the clerk of the Superior Court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is a proceeding under Revisal, sec. 3124, to compel the production of a will. *Williams v. Bailey*, 37.

3. *Same—Denial—Evidence—Clerks of Courts—Issues—Rule Discharged —Costs.*—Where the respondents in proceedings to compel the production of a will (Revisal, sec. 3124) appear before the clerk at the time set for the hearing, and in writing under oath fully deny the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial docket, and the rule against the respondents should be discharged at the petitioner's cost. *Ibid.*

4. *Same—Motions.*—Where a rule issued under the provisions of Revisal, sec. 3124, in proceedings to compel the production of a will, should be discharged, a motion by the respondents to dismiss the proceedings will be treated as a motion to discharge them. *Ibid.*

5. *Wills— Probate— Statutes — Copies — Deeds and Conveyances.*—Under the provisions of chapter 393, Laws of 1885, now incorporated in section 3133 of the Revisal, it is not required that a will executed and admitted to probate in another State be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State. *Vaught v. Williams*, 77.

6. *Same—Subsequent Probate.*—Where a deed to land has been executed by the executor under a power in the will prior to its proper probate, and thereafter the will is duly admitted to probate, this would relate back and authorize the execution of the deed. *Ibid.*

7. *Wills—Direction—Sale of Realty—Debts—Personalty Sufficient—Sales.* A will directing the executor to sell all of the testator's real and personal property and pay all funeral expenses and just debts, "giving and devising" a certain sum of money to each of his brothers and sisters

WILLS—*Continued.*

in Item 2, and in Item 3 "giving and devising" equally to his heirs, naming them, "the balance of his estate: *Held*, the testator is presumed to have known the kind and value of his property with relation to his debts, and that his personalty would be sufficient to pay his debts without resorting to a sale of his realty, and the mandate to sell all of the real and personal property should be complied with and the proceeds distributed as directed in the will. *Mewborn v. Moseley*, 110.

8. *Wills—"Give and Devise"—Intent.*—Where it appears from the terms of the will by the indiscriminate use of the words "give and devise" that the testator intended them to apply to his realty, the will, in that respect, will be so construed. *Ibid.*

9. *Wills—Power of Sale—Implied Power—Deeds and Conveyances—Sales.* The power of an executor to make a deed is implied by an express mandate in the will to sell the testator's lands. *Ibid.*

10. *Wills—Power of Sale—Election—Reconversion.*—Where the executor has sold lands under a power contained in the will without giving the devisees the right to take it in its original state, the equitable right of reconversion does not arise. *Ibid.*

11. *Wills—Devise—Estates—Contingent Remainders—Heirs—Questions of Law—Extrinsic Evidence—University of North Carolina—Statutes.*—A devise by an illegitimate of all of the real and personal property to his wife, and after her death the property to be sold by the executor and the proceeds to be divided among his "legal heirs" after the payment of certain bequests after the death of the wife: *Held*, the terms of the will are unambiguous and the expression "legal heirs" must, as a matter of law, be given their legal significance without the aid of parol evidence tending to show that the testator regarded the children of his mother's sister as his next of kin, or erroneously thought they would inherit as such. The devise being effective upon the death of the wife, the lands of the testator would go to the University of North Carolina under the statute upon the death of the wife and the failure of heirs at that time. *Grantham v. Jinnette*, 229.

12. *Wills—Heirs at Law—Husband and Wife—Statutes—Wife an Heir—Contingent Remainders—Estates.*—Where a testator has devised all of his real and personal property to his wife, the executor to sell the property left by her at her death and divide the proceeds among his "legal heirs," and the wife has taken under the will and has died, and there are no heirs of the testator at that time to take under the terms of the will: *Held*, the widow was not the heir at law of her husband under the common law, and the statute (Revisal, sec. 1556), while making her an heir of his, does so, under Rule 8, where the husband has not devised the property, and when there are no heirs at law of the testator at the time of the wife's death the inheritance will not descend to her heirs at law, nor can they take against the express provisions of the will. *Ibid.*

13. *Wills—Devise—Estates—Remainders—Heirs—"Legal Representatives"—Rule in Shelley's Case.*—A devise of testator's lands to his son, and then to his "legal representatives," conveys the estate in remainder to the heirs of the first taker as a class "to take in succession from generation to generation," to the same extent and in the same quantity as they would take under our canons of descent; and the words "legal

representatives" being synonymous with the word "heirs," the devise comes within the meaning of the word "heirs" used in the Rule in Shelley's case, the remaindermen not taking as by purchase, and the fee-simple absolute title vests in the first taker. *Nobles v. Nobles*, 243.

14. *Wills—Residuary Clause— Widows— Remarriage— Distribution— Children—Trusts—Executors and Administrators.*—A devise to the widow in the residuary clause of an equal part with the named children of the testator of his estate, altered by his codicil, that in the event of her remarriage during the minority of the children, her share shall be equally divided among the children, gives the widow only the proceeds or profits of her distributive share of the personalty, to be paid by the executor named, which shall cease in the event of her remarriage during the minority of the children. ALLEN, J., writing the opinion of the Court. *Bryan v. Harper*, 308.

15. *Wills—Devise—Restraint on Alienation.*—A provision in a devise of lands to the testator's children that none of it should be sold or disposed of unless the devisee "desires to sell his part to one or both of" the others, and it appears that one of them has offered his share to the others, who had refused to purchase it: *Held*, the provision was a void restraint upon alienation of the land. *Norwood v. Crowder*, 469.

16. *Wills—Devisavit Vel Non—Signatures—Subscribing Witnesses.*—Where upon the trial of an issue of *devisavit vel non* there was evidence that the mind of the testator, at the time of the execution of the paper-writing, was bright and alert, though he was physically weak and confined to his bed from the effect of the sickness from which he soon thereafter died; that the paper-writing offered for probate had been written at his dictation, afterwards approved by him, and signed or acknowledged in the presence of subscribing witnesses, who signed, one directly and the other impliedly, at his request, and each in his presence and with his knowledge, but not in the presence of each other: *Held*, that the circumstances and surroundings are sufficient for the jury to properly infer that the writing was legally executed and is a valid will. *In re Will of Margaret Deyton*, 494.

17. *Wills—Subscribing Witnesses—Signature—In Each Other's Presence—Statutes— Testator's Presence— Acknowledgment of Signature— Request of Testator.*—It is not necessary to the valid execution of a will that the witnesses thereto subscribe their names in the presence of each other (Rev., sec. 3113), or that after the will had been drawn to the satisfaction of the testator and signed by him a witness had been sent for, and at the request of another, in his presence of the testator and with his concurrence, subscribed his name as such witness, after the acknowledgment of the testator, express or implied, from the circumstances, that the signature to the will was his own. *Ibid.*

18. *Wills—Subscribing Witnesses—Testator's Presence.*—A subscribing witness to a will is in the presence of the testator, within the intent and meaning of the statute, when he signs his name thereto where the testator could have seen him do so under such circumstances as would prevent the substitution of another and spurious paper for the genuine one; and it is not required that the witness should have subscribed his name in the same room with the testator if the latter could see him at the time. *Ibid.*

WILLS—*Continued.*

19. *Wills—Subscribing Witnesses—Execution of Wills—Evidence.*—The testimony of the subscribing witnesses to a will to the contrary does not preclude the propounders from showing by other evidence that the will was in fact valid and executed according to law, and where the testimony of the two subscribing witnesses is conflicting as to whether one of them had signed in the testator's presence, it is for the jury to determine the fact under the evidence. *Ibid.*

20. *Wills—Form Sufficient—Separate Writings.*—Two writings were offered for probate in common form, appearing to be memoranda of gifts to certain persons of specified personal property and an interest in a certain mine owned by the testator, and containing a disposition of the property remaining after the "foregoing bequests": *Held*, sufficient in form to pass the property as a valid will, where it is shown that the requirements of the statute as to the signature of the testator and the subscribing witnesses, etc., have been properly followed, and the two instruments have been properly identified and linked together as parts of the same instrument. *Ibid.*

WITNESSES. See Evidence, 1; Criminal Law, 4; Wills, 16, 17, 18, 19.

WORDS. See Contracts, 19.

WRITS. See Courts, 6.

WRITING. See Contracts, 2.

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